IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

No. 397

UNITED STATES OF AMERICA,
Appellant,

vs.

THE BORDEN COMPANY, ET AL.,

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

BRIEF FOR THE BORDEN COMPANY, BOWMAN DAIRY COMPANY, CAPITOL DAIRY COMPANY AND CERTAIN INDIVIDUAL DEFENDANTS.

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BRIEF FOR THE BORDEN COMPANY AND OTHERS

SUMMARY OF ARGUMENT

I.

If, as the Government contends, the decision and judgment of the District Court were based upon a construction of the Sherman Act within the meaning of the Criminal Appeals Act of March 2, 1907, these defendants have a right to urge, in support of the judgment of the trial court, grounds going to the construction and validity of the Sherman Act which are based upon the record, even though some of such grounds were not relied upon by the District Court.

II.

The Capper-Volstead Act has removed from the purview of the Sherman Act, and placed under the primary jurisdiction of the Secretary of Agriculture, combinations, contracts and agreements of dairymen's cooperative associations for the marketing of milk.

The terms and legislative history of the Capper-Volstead Act indicate that it was intended by such Act to grant to farmers exemption from the operation of the Sherman Act in cooperatively marketing their products.

The combinations, contracts and agreements charged in the indictment involve the cooperative marketing of the products of the Pure Milk Association, a dairymen's cooperative, and since it is lawful for the Pure Milk Association to enter into said combinations, contracts and agreements, it was lawful for these defendants to become parties thereto.

III.

Regardless of whether the Capper-Volstead Act exempts either the Pure Milk Association or these defendants from the operation of the Sherman Act with respect to the particular matters described in the indictment, said Act gives to agricultural cooperative associations broad powers to engage in restraints and monopolies of interstate trade which would not have been lawful for them under the Sherman Act. If the same acts are not lawful for others, the Capper-Volstead Act has so amended the Sherman Act or modified its operation that it discriminates against others in favor of farmers.

Such discrimination is arbitrary and unreasonable and it therefore amounts to a denial to these defendants of due process of law in contravention of the Fifth Amendment.

IV.

Count Two of the indictment, as construed by the District Court, charges that the defendants fixed and maintained prices for the sale of fluid milk by distributors to consumers in the City of Chicago.

The indictment shows that prior to the sale by distributors to consumers, the milk had ceased to move in interstate commerce by coming to rest within the State of Illinois at plants where it was pasteurized, bottled and otherwise handled by the distributors.

Count Two does not charge that the defendants intended to restrain interstate commerce by fixing retail prices in Chicago, nor does it show facts from which such an intent can be presumed.

What effect, if any, the fixing of retail prices in Chicago had upon the interstate movement of milk was therefore indirect and remote.

V.

Count Four charges that the defendants imposed the base-surplus plan of production upon the Chicago milk shed. The base-surplus plan is not a limitation upon the production or supply of milk, but merely a plan to equalize seasonal production.

Even if the base-surplus plan may have had some effect upon the quantity of milk moving in interstate commerce to Chicago, such effect was remote and indirect only.

ARGUMENT

I.

THE DEFENDANTS IN AN APPEAL BY THE GOVERNMENT UNDER SECTION 682 OF TITLE 18, U. S. C. A., ENTITLED, "THE CRIMINAL APPEALS ACT OF MARCH 2, 1907" MAY URGE IN SUPPORT OF THE JUDGMENT OF THE DISTRICT COURT NOT ONLY THE REASONS UPON WHICH SAID COURT RELIED BUT ANY GROUNDS BASED UPON THE RECORD WHICH GO TO THE VALIDITY OR CONSTRUCTION OF THE STATUTE UPON WHICH THE INDICTMENT WAS FOUNDED.

If the Court decides that it has jurisdiction of this appeal under Section 682 of Title 18, U. S. C. A., entitled "The Criminal Appeals Act of March 2, 1907," it will necessarily be because the Court finds that the decision of the District Court dismissing the indictment herein was based upon the "construction of the statute upon which the indictment is founded." To sustain the judgment of the District Court these defendants rely not only upon the reasons given by that court for its judgment but also upon other grounds going to the construction and validity of the statute upon which the indictment is founded.

The District Court, having specified, among the many grounds of demurrer presented by the various defendants, two grounds sufficient in themselves to dispose of Counts One, Two and Four of the indictment, found it unnecessary thoroughly to consider the various additional grounds presented by the defendants. This is illustrated by the language of the District Court in its opinion (R. 112), where that court said:

> "It will be perceived, however, from what has been stated, that as to Counts One, Two and Four of the indictment it is unnecessary to decide whether or not the allegations of the indictment show that interstate commerce was or was not restrained."

Acknowledging the lack of necessity for considering them thoroughly, the trial court, in the judgment order of July 28, 1939 (R. 114-118) overruled *pro forma* the grounds raised by the demurrers and motions to quash upon which he was not relying (R. 117). Doubtless the court below would not have disposed of them so perfunctorily had he not realized that upon an appeal to this Court under the Criminal Appeals Act this Court would examine not only the grounds upon which he based his judgment but all other grounds raised by the demurrers and motions to quash which go to the construction or validity of the statute upon which the indictment is founded.

These defendants, by their demurrers and motions to quash, challenged Counts One, Two and Four of the indictment (Count Three is not before this Court for consideration), upon the grounds, among others:

(1) That said indictment and each count thereof does not aver or set forth any facts nor allege or charge the commission of any acts constituting an offense against the United States of America;

(2) That said indictment fails to allege facts sufficient to show an unlawful combination and conspiracy under Section 1 of the Sherman Act;

(3) That Counts Two and Four of the indictment fail to state facts sufficient to show that the acts therein charged directly affected interstate trade and commerce in milk; and

(4) That the Sherman Act has been so modified by the Capper-Volstead Act as to render it unconstitutional and to deny to these defendants due process of law. (R. 34-40, 42-50.)

Each of said grounds of attack upon the indictment involves the "construction of the statute upon which the indictment is founded" to the same extent, although in a

somewhat different manner, as the grounds upon which the District Court dismissed the indictment. The last of said grounds also goes to the validity of the statute upon which the indictment is founded.

It is settled that a determination of whether the acts charged in an indictment under the Sherman Act involve or affect interstate commerce is a construction of the Sherman Act within the meaning of the Criminal Appeals Act. In *United States* v. *Patten*, 226 U. S. 525, it was urged by the defendants that running a corner in cotton did not in any way affect interstate commerce and hence was not condemned by the Sherman Act. The trial court so held and upon appeal by the government to this Court under the Criminal Appeals Act the jurisdiction of this Court was challenged upon the ground that no question of construction of the statute was involved. This Court held, however, that the trial court could not have decided as it did that the acts charged were not within the condemnation of the statute without first ascertaining what the statute condemned, which of course involved its construction (p. 535).

In *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, this Court entertained an appeal under the Criminal Appeals Act from a district court judgment quashing an indictment for conspiracy to violate a Joint Resolution of Congress and a Presidential proclamation made thereunder. The defendants demurred to the indictments on the grounds, first: that the Joint Resolution effected an invalid delegation of legislative power to the executive; second: that the Joint Resolution never became effective because of the failure of the President to find essential jurisdictional facts; and third: that a second proclamation operated to put an end to the alleged liability under the Joint Resolution. The court below sustained the demurrers upon the first point but overruled them on the

second and third points (p. 314.) This Court held that the point relied upon by the trial court was not well taken (pp. 314-329). The defendants contended, however, that the judgment of the trial court was correct on the other grounds asserted by them. The government contended that under the Criminal Appeals Act the jurisdiction of this Court did not extend to the questions decided in favor of the United States by the trial court. This Court overruled the government's contention and held that it was open to it to inquire whether or not the judgment could be sustained upon the grounds rejected by the trial court. It held that the principle followed in *Langnes* v. *Green*, 282 U. S. 531, that in other types of appeals the party prevailing below might urge in this Court a ground in support of the judgment which the lower court had rejected, was applicable in appeals under the Criminal Appeals Act (pp. 329, 330). Other decisions of this Court follow the same general rule. *United States* v. *American Railway Express Co.*, 265 U. S. 425; *Indiana Farmers Guide Publishing Co.* v. *Prairie Farmer Publishing Co.*, 293 U. S. 268; *Morley Company* v. *Maryland Casualty Co.*, 300 U. S. 185.

Under the same principle the defendants in this case are not restricted to the grounds relied upon by the district court herein.

The only limitation which this Court has announced upon its power to consider the whole record in an appeal under the Criminal Appeals Act, once it has accepted jurisdiction of a case thereunder, is that it cannot consider questions which relate to the construction of the indictment and its sufficiency merely as a pleading. *United States* v. *Carter*, 231 U. S. 492; *United States* v. *Hastings*, 296 U. S. 188. None of the points hereinafter argued by these defendants relates to the construction

of the indictment or its sufficiency merely as a pleading. Each of the points here urged involves the construction or validity of the statute upon which the indictment is founded and was either relied upon by the District Court in its decision or overruled *pro forma*.

II.

THE CAPPER-VOLSTEAD ACT AUTHORIZES THE CONTRACTS AND AGREEMENTS COMPLAINED OF IN COUNTS ONE, TWO AND FOUR OF THE INDICTMENT AND WITHDRAWS THE SUBJECT MATTER OF THOSE COUNTS FROM THE PURVIEW OF THE SHERMAN ACT.

The District Court dismissed the indictment on the ground that the marketing of agricultural products, including milk, has been removed from the purview of the Sherman Act and that the primary jurisdiction to terminate any practices in the marketing of such products which works disadvantage to the consuming public is in the Secretary of Agriculture. The Court based its decision on a series of acts of Congress, including the Capper-Volstead Act of February 18, 1922,* and the Agricultural Adjustment Act of May 12, 1933, as amended and reenacted by the Agricultural Marketing Agreement Act of 1937.**

These defendants do not ignore or fail to place reliance upon the provisions of the Agricultural Adjustment Act as amended, to which the Government addresses a substantial portion of its argument. That Act emphasizes the conclusion which we contend is to be drawn in the first instance from the provision of the Capper-Volstead Act, that Congress intended to vest solely in the Secretary of Agriculture whatever supervisory power over interstate commerce in agricultural products it deems necessary.

* 7 U. S. C. A. 291, 292; 42 Stat. 388.

** 7 U. S. C. A. 601 *et seq.*; 50 Stat. 246.

The Agricultural Adjustment Act also demonstrates the kind of marketing plans which Congress deems essential to the successful administration of agricultural economy. However, the brief filed herein by other defendants treats fully of the terms and effect of the Agricultural Adjustment Act, making it unnecessary to consider the same subject in this brief. These defendants desire to argue here the proposition that the Capper-Volstead Act supports and justifies the decision of the district court by authorizing and removing from the purview of the Sherman Act and placing under the exclusive original jurisdiction of the Secretary of Agriculture the contracts and agreements described in the indictment.

It should be observed, before we undertake to discuss fully the terms and effect of the Capper-Volstead Act, that it does not follow, as the Government claims, that because the anti-trust laws have been suspended with respect to the marketing of agricultural products, persons normally engaged in the production, handling and marketing of such products may lawfully engage in every kind of restraint of trade. It may be conceded for the purpose of argument that if producers, processors or handlers of agricultural products should engage in a conspiracy in restraint of trade which bore no reasonable relationship to the marketing of such product, they would be subject to the Sherman Act. However, the district court has construed the indictment in this case as relating primarily to the relationship between producers and distributors of milk and has held that it is only by means of such relationship that interstate commerce is involved in the case at all. The Court stated (R. 105):

> "Counts I, II and IV * * * *deal with the relationship between the producer and distributor of fluid milk. That relationship is the only basis upon which the government predicates the theory that interstate commerce in fluid milk exists* whereby a conspiracy

> under the Sherman Act may be charged. In substance these counts charge that the defendants engaged in a combination and conspiracy to restrain trade and commerce in fluid milk among the several states (1) by fixing and maintaining prices to be paid to producers; (2) by fixing and maintaining prices to be charged by distributors to consumers; and (3) by restraining, limiting, and controlling the supply of fluid milk moving in interstate commerce by means of what is known as the base surplus plan. *Price fixing is the essence of these counts.*"*

We may therefore lay aside as futile any further discussion as to the possible application of the Sherman Act if this case involved something other than the marketing of an agricultural product in interstate commerce.

The Capper-Volstead Act provides:

> Sec. 1. "That * * * dairymen * * * may act together in associations * * * in collectively * * * marketing * * * products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes * * *."

The application of this Act to the facts pleaded in the indictment raises two questions: (1) What acts, contracts and agreements of dairymen and dairymen's cooperatives are authorized by this Act? (2) What is the effect of the Act on the liability of others, not dairymen, but with whom dairymen and dairymen's cooperatives make contracts and agreements?

The second problem can be disposed of summarily. If associations of dairymen are authorized to enter into contracts and combinations with others necessary for collective marketing of their products, it must be lawful for such others to enter into those contracts with such associations. Otherwise, the right given the dairymen and their exemption from the purview of the anti-trust

* Italics ours throughout brief unless otherwise stated.

laws would be meaningless or could be exercised only by inducing others to violate the laws. The contracts and agreements described in Counts One, Two and Four of the indictment are contracts and agreements with the Pure Milk Association, a dairymen's cooperative, concerning the collective marketing of milk. It is specifically alleged in each count that the Pure Milk Association was a party to the contracts and agreements complained of. If the Pure Milk Association is authorized by the Capper-Volstead Act to make these contracts and agreements, these defendants cannot be said to have violated the Sherman Act in becoming parties thereto.

The fact that the Pure Milk Association is authorized by the Capper-Volstead Act to enter into the contracts and agreements described in the indictment, though not susceptible to the same summary treatment, is nonetheless clearly demonstrable. The court below stated that price fixing is the essence of these counts, and further stated (R. 105):

> "*This Act* (the Capper-Volstead Act) *legalized price fixing for those within its purview.* To that extent it modifies the Sherman Act. It removes from the Sherman Act those organizations, cooperative in their nature, which come within the purview of the Capper-Volstead Act."

The holding of the District Court was obviously correct, as we shall proceed to demonstrate.

By Section 1 of the Capper-Volstead Act, farmers, without limitation as to their number or as to the amount of any agricultural commodity which they control or as to the extent to which they are otherwise in competition with each other, are empowered to "act together * * * in collectively processing, preparing for market, handling and marketing" their products, and to "make the necessary contracts and agreements to effect such purposes." In the exercise of those powers it is necessary that such

associations enter into contracts for the sale to others of the products of their members. Contracts of sale must fix selling prices, and hence it follows that such associations or their common marketing agencies, to the extent to which they may control the supply of any agricultural commodity (and no limit is imposed as to that), are authorized to fix the market prices by agreement with persons not mentioned in the Capper-Volstead Act.

That Congress contemplated that restraints of trade and monopolies, theretofore illegal, would be the natural result of the rights granted to farmers under the Capper-Volstead Act, and intended not only to legalize such restraints and monopolies and thus to relax the anti-trust laws, but also vest in the Secretary of Agriculture primary jurisdiction to prevent injury to the public by reason thereof, are conclusions which flow irresistibly from the provisions of Section 2 of the Act. This Section provides:

> "If the Secretary of Agriculture shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason thereof, he shall serve upon such association a complaint stating his charge in that respect, * * *"

It is further provided that a hearing shall be had on such a complaint, and that if the Secretary finds that such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced thereby, he shall issue a cease and desist order. Only thereafter is the matter to be referred to the courts, where the enforcement of the Secretary's order is to be undertaken by the Department of Justice.

That it was the purpose of Congress, in enacting the Capper-Volstead Act, to withdraw the combinations, contracts and agreements of producers of agricultural prod-

ucts from the purview of the Sherman Act, is apparent from the discussions in the House of Representatives and in the Senate during the debates preceding its enactment. Such discussions clearly show that the Act was intended not only to grant to farmers the right to combine in bargaining units which would have substantial equality of bargaining power with business corporations, but also to encourage and protect farmers in making full use of such rights by assuring them complete immunity from prosecution by the Department of Justice under the Sherman Act. It was recognized repeatedly during the debates that the powers granted by Section 1 of the Capper-Volstead Act would authorize farmers to engage in all kinds of restraints of interstate commerce in agricultural products, including the fixing and raising of prices paid by handlers to producers and of resale prices to be charged by handlers to consumers. It was recognized that the exercise of such powers would authorize monopolies in farm products. All of such powers were considered necessary to enable farmers to achieve parity of prices with industry in order to remedy the depressed condition of agriculture which existed at that time. Senator Walsh, then Chairman of the Senate Judiciary Committee, advocated an amendment to the Act which would have eliminated Section 2 and inserted a provision in Section 1 that none of the powers therein granted could be exercised to bring about a monopoly. The Senator expressly stated that he intended thereby to give farmers complete immunity from Section 1 of the Sherman Act but to leave them subject to Section 2 thereof. His proposed amendment was defeated in the Senate and Section 2 of the Capper-Volstead Act in its present form was restored. The debates show that it was the intention to substitute the Secretary of Agriculture for the Department of Justice as the law enforcing agency with respect to farm products, thereby making the Secretary of Agriculture a buffer be-

tween the farmers and the possibility of any criminal prosecution under the anti-trust laws.

We have abstracted from the Congressional Record pertinent passages from the debates upon the Capper-Volstead Act as Appendix C to this brief. They fully bear out all of the statements above made concerning the intention of Congress and show that the excerpts from the Congressional Record set forth in the Government's brief do not fully disclose the trend of the discussions.

The construction of the Capper-Volstead Act which we have shown is required by its terms and was intended by Congress, has been adopted by the Attorney General of the United States in the following opinion:

> "Section 1 of the Capper-Volstead Act relates to producers acting together in associations, corporate or otherwise, 'in collectively processing, preparing for market, handling and marketing in interstate and foreign commence, such products of persons so engaged' * * *. Its object was primarily to insure cooperative associations that qualified thereunder immunity from prosecution under the said Anti-Trust Laws." 36 Op. Atty. Gen. 33.

The Government takes the position that the Capper-Volstead Act merely "allowed farmers to combine for mutual benefit in the same way that individual stockholders are permitted to act together in a modern private commercial corporation" (Government Brief, p. 57). The fallacy in the Government's argument is that general incorporation laws have always been as available to farmers as to business men, subject always to the restrictions of the Sherman Act. No special legislation was needed to permit farmers to incorporate in the same manner as stockholders in an ordinary business corporation. We have shown that the purpose of the Capper-Volstead Act was to permit farmers to organize and act in a manner not available under general laws, to exempt them from the

Sherman Act, and to place them under the original jurisdiction of the Department of Agriculture instead of the Department of Justice.

The Government in its brief attempts to evolve a theory that Section 2 of the Capper-Volstead Act is aimed at evils which were beyond the reach of the Sherman Act, so that the fields covered by the remedial provisions of the two acts do not conflict or overlap. The Government states:

> "The power given to the Secretary to protect the public against unduly enhanced prices resulting from farm co-operatives is similar to an anti-profiteering law. It opens up a field going far beyond the purview of the Sherman Act, to wit, direct government intervention in price policy in cases *where no other evidence of illegal combination exists*" (Government Brief, p. 59).

Directly contrary to the italicized words in the Government's argument, Section 2 of the Capper-Volstead Act authorizes the Secretary to act *only* where he finds that interstate trade has been restrained or monopolized. The existence of a condition which previously would have been a violation of the Sherman Act is a condition precedent to the operation of Section 2 of the Capper-Volstead Act. Far from occupying different fields, the two acts, by their terms, deal with the same things, viz., restraints and monopolies of interstate and foreign commerce. The difference between them is that under the Capper-Volstead Act a further condition must exist before the Secretary can act. It is not enough that there be a restraint or monopoly, but interstate trade must be restrained or monopolized "to such an extent that the price of any agricultural product is unduly enhanced."

The Government's argument continues:

> "The Sherman Act itself has nothing directly to do with the reasonableness of prices. If a combination is not unreasonable in using its privileges to restrain trade, it is immaterial how high the prices go." (Government Brief, p. 59).

Thus the Government, in its efforts to show that the Capper-Volstead Act does not relate to the same subject matter as does the Sherman Act, takes the position that under the Sherman Act a combination or monopoly might be reasonable even though its purpose and effect were to fix and enhance prices. We submit that such a conclusion ignores the underlying purpose of the Sherman Act, which is not merely to prevent restraints and monopolies as an end in itself, but to prevent them to the end that the price of goods may be kept low by means of competition. In *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, the criterion of reasonableness which this Court applied was the power to fix prices and not merely the existence of a combination among competitors. In *United States* v. *Trenton Potteries*, 273 U. S. 392, this Court, finding the combination there involved had fixed prices, held that fact so conclusive of its unreasonableness under the Sherman Act that the Court would not even inquire whether the prices fixed were reasonable.

The Government characterizes the district court's interpretation of the Capper-Volstead Act with attempted scorn in the following words:

> "It is like saying that the passage of an anti-profiteering law prohibiting corporations from charging unreasonable prices licenses them to form cartels" (Government Brief, p. 60).

We submit that the characterization falls short of its mark as sarcasm because it is a true summary of the effect of the Capper-Volstead Act. Section 2 of that Act is an anti-profiteering statute. By condemning only restraints and combinations of interstate trade which result in profiteering, it legalizes, when considered with the provisions of Section 1 of the same Act, combinations and restraints of trade among farmers which do not profiteer. A cartel is defined by Webster as:

> "A combination of separate firms to maintain

prices above a competitive figure. It is the German equivalent of the American pool."

That is precisely the nature and purpose of the associations and combinations of associations which the Capper-Volstead Act contemplates.

We submit that, contrary to the Government's position, the following conclusions are inescapable: First, that both the Sherman Act and Section 2 of the Capper-Volstead Act deal with restraints and monopolies of interstate and foreign commerce; Second, that the differences between said statutes are, (a) that under the Sherman Act any form of combination to restrain trade or monopoly of trade which reduces competition or tends to fix or enhance prices is forbidden, while under Section 2 of the Capper-Volstead Act any form of combination to restrain trade or monopoly of trade is permitted, provided only that it does not unduly enhance prices; (b) that the remedial provisions of the Sherman Act contemplate a resort to the criminal courts by the Department of Justice in the first instance, while those of the Capper-Volstead Act contemplate an intermediate regulation by the Secretary of Agriculture in civil proceedings; Third, that unless the Capper-Volstead Act gives farmers the right to restrain and monopolize interstate trade in farm products in a manner and to an extent which would otherwise be a violation of the Sherman Act, its provisions are meaningless and fail utterly to accomplish the announced purposes of Congress in enacting it.

The fact that the indictment charges that the Pure Milk Association and the defendant distributors attempted to impose fixed prices and the base-surplus plan on so-called "independent" producers and distributors, cannot be relied upon to make out a violation of the Sherman Act. Such activities are within the purview of the Capper-Volstead Act. It has long been recognized that no

association of producers of agricultural products may effectively market their products or, for that matter, remain a factor in the market, unless they are able to control conditions throughout the market. There are included in Appendix B attached to this brief, statements of marketing experts and dairy economists, many of them high officials in the Department of Agriculture, amplifying this proposition.

However, it is unnecessary to give further consideration to this point in this brief in view of the holding of the District Court that the indictment does not show that the so-called "independent" producers and distributors are engaged in interstate commerce or that the milk produced or handled by them moved in or become part of interstate commerce. The concluding paragraph of the opinion below contains this statement (Record, p. 113):

> "The indictment alleges generally the origin of fluid milk transported into Chicago from Illinois, Indiana, Michigan and Wisconsin. It further alleges that all the major distributors have country stations outside of Illinois and transport, or cause to be transported, milk received in such stations to Chicago. The indictment is lacking as to averments or allegations as to the origin of fluid milk sold by stores or independent distributors. It is only by intendment and inference that the Court could conclude from an examination of the indictment that the conspiracy charged in Count three had any effect on interstate commerce. It is only by such intendment and inference that the Court could conclude that the stores and independent distributors whose system of distribution the defendants are alleged to have controlled, sold fluid milk which was or had been the subject of interstate commerce. It is a fundamental of criminal pleading that an indictment must allege directly and with certainty every essential element or ingredient of the offense. If any essential element or ingredient of the crime is omitted, such omission cannot be supplied by intendment or implication. (*Pettibone* v. *U. S.*, 148 U. S. 197; *U. S.* v. *Carney*, 228 Fed. 163.)"

The language of the court quoted above had particular reference to Count Three of the indictment; however, all of the allegations in the indictment with reference to the origin and transportation of fluid milk for consumption in Chicago are contained in the first forty-six paragraphs thereof, preliminary to the charge of conspiracy in Count One, and are incorporated by reference thereto in each other count of the indictment. Consequently the conclusion of the trial court that the indictment fails to show the origin of the fluid milk sold by stores and "independent" distributors is equally applicable to all of the counts of the indictment. This court has held that it will not review the District Court's construction of an indictment. *United States* v. *Winslow*, 227 U. S. 202; *United States* v. *Pacific & Artic Ry. & Nav. Co.*, 228 U. S. 87; *United States* v. *Biggs*, 211 U. S. 507; *United States* v. *Patten*, 226 U. S. 525, 540.

It thus appears that any restraint or interference with production of milk by "independent" producers, or the transportation and sale of such milk in the City of Chicago by "independent" distributors or others, would not operate as a restraint of interstate commerce and would not be prohibited by the Sherman Act even if not authorized by the Capper-Volstead Act. The allegations contained in each count of the indictment with reference to the supposed acts of the Milk Dealers Bottle Exchange, the Milk Wagon Drivers' Union, a police officer, and three officers of the Health Department of the City of Chicago, which involved and affected only the business of "independent" producers and distributors, not shown to be engaged in interstate commerce, are likewise and for the same reason insufficient to bring the case within the purview of the Sherman Act.

All combinations, contracts and agreements for the

collective marketing of dairymen's products in interstate commerce having been withdrawn by the Capper-Volstead Act from the purview of the Sherman Act and placed within the exclusive original jurisdiction of the Department of Agriculture, the contracts and agreements set forth in the indictment may not be attacked on the ground that they are not "necessary contracts and agreements to effect" the purposes of the later Act. The determination of what contracts and agreements are necessary is a question of fact to be determined in the first instance by the producers whose marketing problems are involved. There is no allegation in the indictment that any of the contracts and agreements described were not necessary to the marketing of milk in Chicago and, in any event, the Secretary of Agriculture has original jurisdiction to determine if and when associations of dairymen exceed the limitations specified in the Act.

There is no doubt, however, that all of the contracts and agreements described in the indictment are not only germane to the subject matter of the marketing of milk, but are the kind of contracts that are necessary for that purpose. We assume that there can be no denial that the word "necessary" is used in the Capper-Volstead Act, as in other statutes, in the sense of "reasonably necessary and appropriate" rather than "indispensable". The District Court has stated that the defendants are charged (1) with "fixing and maintaining prices to be paid to producers"; (2) with "fixing and maintaining prices to be charged by distributors and consumers"; and (3) with "maintaining, limiting, and controlling the supply of fluid milk moving in interstate commerce by means of what is known as the Base-Surplus Plan". "Fixing and maintaining prices to be paid by distributors" is one step in the marketing of milk and in determining the prices which the producers thereof will receive. Unless the

Capper-Volstead Act authorizes the fixing of prices paid to producers by their customers, the Act is meaningless. "Fixing and maintaining prices to be charged by distributors to consumers" is another step in the same process. Obviously the process of marketing ends only when the milk reaches the consumer and the price which the producer can receive is always limited by the price which the consumer pays. "Restraining, limiting and controlling the supply of fluid milk" is still another step in the marketing thereof as contemplated by the Capper-Volstead Act. No program for the marketing of a product at enhanced prices can ignore the effect upon such prices of the law of supply and demand. Together, all of the contracts and agreements described in the indictment constituted a complete program for the marketing of milk in Chicago.

Conceivably the same milk could have been marketed in other ways, or a less comprehensive plan of marketing could have been agreed upon. However, we believe that the validity and legality of the marketing program agreed upon by the defendants in this case is sufficiently established by the fact that it is the kind of program which is widely used in the marketing of milk and has been advocated by the Government itself as a method of marketing peculiarly appropriate to milk. Of the 161 orders, marketing agreements and licenses promulgated or approved by the Secretary of Agriculture under the Agricultural Adjustment Acts and the Agricultural Marketing Act of 1937 which we have been able to examine, and which are listed in Appendix A attached to this brief, all provide for fixing uniform producer prices. Seventy-two fix uniform prices to consumers and one hundred twenty adopt the base-surplus plan. At the very time that the contracts and agreements complained of in the indictment are said to have been made, there was in effect in the Chicago market

a license issued by the Secretary of Agriculture which fixed uniform producer prices and imposed the base-surplus plan on both producers and distributors. Only twelve months prior thereto, the Secretary of Agriculture had imposed a license upon the producers and distributors in the Chicago milk shed which fixed both producer and consumer prices, and which also adopted the base-surplus plan.

There is appended to this brief as Appendix B a collection of opinions by dairy economists, marketing experts and recognized authorities in the field of co-operative marketing, many of them now high officials in the Department of Agriculture, the consensus of which recognizes and advocates the fixing of uniform producer and resale prices and the adoption of the base-surplus plan as essential to a stable market, without which there can be no successful collective marketing of dairymen's products.

It is respectfully submitted that from all of the reasons hereinbefore given it clearly appears that the Capper-Volstead Act, quite apart from the provisions of the Agricultural Adjustment Act and the Agricultural Marketing Act, fully justifies the conclusions reached by the District Court and requires that its judgment dismissing the indictment herein as to these defendants be affirmed.

III.

THE SHERMAN ACT HAS BEEN SO AMENDED, ALTERED, MODIFIED AND RESTRICTED BY THE CAPPER-VOLSTEAD ACT AS TO RENDER IT UNCONSTITUTIONAL AND TO DENY TO THESE DEFENDANTS DUE PROCESS OF LAW, IN CONTRAVENTION OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The district court in this case found that the defendant, Pure Milk Association, an agricultural cooperative association, was by reason of the Capper-Volstead Act exempt from the Sherman Act with respect to the acts charged in

the indictment. We have argued under Point II hereof that the district court was correct in that conclusion and that it necessarily follows, under the construction which the district court placed upon the indictment, that these defendants were also exempt from the Sherman Act with respect to the violations charged in this case.

However, these defendants further contend that if it should be held that the Pure Milk Association is exempt, but that they are not exempt, the Sherman Act in its present operation is arbitrarily and unreasonably discriminatory as to them and deprives them of due process of law. These defendants further contend that the same result follows even if this Court should hold that the exemption of agricultural cooperative associations under the Capper-Volstead Act does not extend to the particular acts charged in the indictment herein. We believe it has been clearly shown that the sphere of action in which agricultural marketing associations are no longer subject to the Sherman Act is a very broad one and embraces monopolies and restraints of trade which the Sherman Act formerly condemned. We submit that such restraints and monopolies are unquestionably legal for farmers under the Capper-Volstead Act and that if they remain illegal for others under the Sherman Act there arises a discrimination against such others. It remains only to determine whether such discrimination is so arbitrary and unreasonable as to deny to such others due process of law.*

In *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, this Court considered the validity of an Illinois anti-trust statute enacted in 1893. The statute prohibited monopolies and restraints of trade in broad terms and provided that

* Of course, if the Court should hold that with respect to the acts charged in the indictment herein these defendants, as well as the Pure Milk Association, are exempt from prosecution by reason of the Capper-Volstead Act, these defendants could not further argue the discriminatory effect of the Sherman Act in this case because they would not have been prejudiced thereby.

any violation of its provisions should be a misdemeanor. It further provided, however, that the act should not apply to agricultural products or livestock while in the hands of the producer or raiser. The Court observed that, so far as that statute was concerned, two or more agriculturalists or livestock raisers could combine to fix and control prices and to eliminate all competition among themselves or others in respect of their products or livestock in hand, but that exactly the same things, if done by others, constituted a public offense (pp. 556-557). The Court held that a state, in prescribing regulations for the conduct of trade, cannot divide those engaged in trade into classes and make criminals of one class if they do certain forbidden things, while allowing another and favored class engaged in the same domestic trade to do the same things with impunity. It held that such a statute is not a legitimate exercise of the power of classification, and that it rests upon no reasonable basis and is purely arbitrary (p. 563).

The effect of Section 9 of the Illinois Statute, as thus construed, was the same as the effect which we have shown must be given to the Capper-Volstead Act, namely, that farmers may combine to restrain trade in a manner which would be criminal if done by others.

It is true that the exemption afforded farmers by the Illinois Act was uncontrolled, while associations of farmers under the Capper-Volstead Act may be enjoined by the Secretary of Agriculture if they monopolize or restrain trade to such an extent that the price of any farm product is unduly enhanced, but, so far as criminal liability is concerned, the exemption is as unqualified in one statute as in another, and it was on the ground of exemption from *criminal* liability that the *Connolly* case was decided.

The *Connolly* case was followed in *United States* v.

Armstrong (D. C. Ind.), 265 Fed. 683, in passing upon the constitutionality of the Food Control Act of August 10, 1917, as amended October 22, 1919 (the Lever Act). That Act made it unlawful to waste, hoard or monopolize necessities, or to engage in any discriminatory, unfair, deceptive or wasteful practice, or to make any unreasonable rates or charges in dealing with necessities, or to limit the production or restrict the supply or distribution thereof. Several provisos exempted agricultural producers and their cooperative associations from the provisions of the Act. The court held that the case could not be differentiated from the *Connolly* case and that the classification contained therein was arbitrary and not natural or reasonable and was therefore repugnant to the due process clause of the Fifth Amendment (p. 693).

The same conclusion as to the unconstitutionality of the Lever Act was reached in *United States* v. *Yount*, (D. C. W. D. Pa.) 267 Fed. 861. In that case the court cited and quoted from the *Connolly* case. It observed that under the exemption afforded them by the Lever Act, farmers, dairymen, stockmen and other agriculturalists might form a gigantic combination utterly destructive of the purpose of the statute but within the sanction of its provisos, while the same acts committed by any other person not in the favored class would make him a criminal. It held that such classification was unjust and arbitrary in the extreme and that it violated both the letter and the spirit of the Fifth Amendment (p. 865).

In *Beatrice Creamery Co.* v. *Cline* (D. C. Colo.) 9 Fed. (2d) 176, the court held a Colorado anti-trust act unconstitutional under the doctrine of the *Connolly* case. The act had been passed in 1913. In 1923 Colorado passed an agricultural cooperative marketing act. Associations organized thereunder were given broad powers to

prepare for market and market the products of their members, and two or more such associations were authorized to have common marketing agencies. (Compare with Section 1 of the Capper-Volstead Act.)

The court quoted at length from the *Connolly* case and held that under the authority of that case the Colorado anti-trust act had been rendered unconstitutional by the subsequent passage of the Colorado agricultural cooperative marketing act by reason of the exemptions to farmers granted by the latter act.

The Kentucky Court of Appeals recognized and applied the doctrine of the *Connolly* case in *Commonwealth* v. *International Harvester Co.*, 131 Ky. 551; 115 S. W. 703, a case which later came to this Court on another point. In that case the state court had before it a Kentucky anti-trust statute enacted in 1890, which sweepingly condemned all pools, trusts and combinations, and a statute subsequently enacted in 1906 declaring it lawful for agricultural producers to pool their crops for the purpose of marketing them so as to obtain a higher price than they might by selling said crops separately. Those two statutes when considered in relation to each other were claimed by the defendant in that case to violate the equal protection of the laws clause of the Fourteenth Amendment.

To avoid the result that the 1906 Act was discriminatory in liberalizing the anti-trust statute of 1890 in favor of farmers, the court adopted the view that the effect of the later act was to confer upon all, and not upon farmers alone, the right to form pools. Three dissenting judges held the view that the 1906 act had rendered the 1890 anti-trust law unconstitutional under the doctrine of the *Connolly* case. Thus, while a majority of the judges of the Kentucky court found a way to distinguish the *Connolly* case and save the later legislation designed to aid farmers by

extending its benefits to all others, all of the judges of that court recognized that unless the discriminatory effect of the two statutes could be so eliminated the *Connolly* case would condemn the earlier legislation.

The fact that the *Connolly* case was based on the equal protection of the laws clause of the Fourteenth Amendment, which applies only to state legislation, does not prevent the principle of that case from being applicable to Federal legislation subject only to the Fifth Amendment. Both in the *Armstrong* case and the *Yount* case, cited above, the courts held that the principle of the *Connolly* case controlled their decisions although in each case Federal legislation was involved and it was held unconstitutional under the Fifth Amendment. There may be some differences between the power of classification afforded the states under the Fourteenth Amendment and that afforded Congress under the Fifth Amendment, but it has never been held, and it must be admitted, that arbitrary and unreasonable classification is as much a denial of due process of law as of equal protection of the laws. In either case, it is not the mere fact of classification which renders legislation unconstitutional but the exercise of the power of classification in an arbitrary and unreasonable manner. For some legislative purposes farmers may doubtless be classified separately. It is the contention here, however, that the *Connolly* case and the cases which have followed it do not leave open to question the proposition that it is an arbitrary and unjust discrimination to compel some who engage in trade to remain subject to a criminal statute which forbids them, and once forbade all others, to monopolize or restrain such trade, when agricultural producers are not only permitted but encouraged by a subsequently enacted statute to do those very things.

It is therefore respectfully submitted that unless it be

held that the exemption from the operation of the Sherman Act extended to farmers under the Capper-Volstead Act is also extended to these defendants with respect to the acts described in the indictment herein, as construed by the district court, the Sherman Act has been so modified, altered and amended by the Capper-Volstead Act as to render it arbitrarily, unjustly and unreasonably discriminatory in its operation and to thereby deny to these defendants due process of law.

IV.

THE SUPPOSED CONSPIRACY DESCRIBED IN COUNT TWO OF THE INDICTMENT "TO FIX AND MAINTAIN BY COMMON AND CONCERTED ACTION, UNIFORM, ARBITRARY AND NON-COMPETITIVE PRICES FOR THE SALE BY THE DISTRIBUTORS IN THE CITY OF CHICAGO OF FLUID MILK SHIPPED IN THE SAID CITY FROM THE STATES OF ILLINOIS, INDIANA, MICHIGAN AND WISCONSIN" DOES NOT AFFECT OR ONLY INDIRECTLY AFFECTS INTERSTATE COMMERCE.

The gravamen of Count Two of the indictment is that the defendants fixed and maintained arbitrary and non-competitive prices for the sale of fluid milk in the City of Chicago. (R. 101.) Price fixing does not of itself violate the Sherman Act unless it involves a direct restraint of interstate commerce. It is maintained by these defendants that the acts charged in Count Two do not demonstrate such direct restraint as is required to state a crime upon a proper construction of Section 1 of the Sherman Act.

A. Interstate Commerce Ceased upon the Delivery of the Milk, Previously Moving in Interstate Commerce, to the Plants of Distributors in the City of Chicago.

It appears from the allegations of the indictment that fluid milk produced outside the State of Illinois and shipped into the State is delivered with milk produced within the State of Illinois "to a place, premise or establishment

where milk is collected preparatory to pasteurization elsewhere, or to a pasteurization plant where milk is handled and otherwise prepared for distribution and sale as fluid milk." (R. 3.) "Handling is pasteurizing and bottling fluid milk." (R. 2.) There is no allegation that the milk was destined to or did move beyond the State of Illinois after handling.

It is the contention of these defendants that interstate commerce ends when the milk is delivered to the pasteurization plant where it is commingled with milk produced within the state and pasteurized, cooled, bottled "and otherwise prepared for distribution and sale as fluid milk." (R. 3.) The situation is not unlike that described in *Atlantic Coast Line Railroad Co.* v. *Standard Oil Co.*, 275 U. S. 257, 267, which involved oil transported by boat to Florida. The oil was drained from the boats into storage tanks and was thereafter moved within the State of Florida by rail and by tank trucks to wholesale and retail dealers. It was there held that the interstate or foreign commerce in this oil ended upon its delivery to the plaintiff into the storage tanks or the storage tank cars at the seaboard, and that from there its distribution to storage tanks, tank cars, bulk stations and drive-in stations, or directly by tank wagons to customers, was intrastate commerce; that the reshipment of an interstate or foreign shipment does not necessarily establish a continuity of movement or prevent the shipment to a point within the same state from having an independent or intrastate character, even though it be in the same cars. The distribution of milk from the pasteurization plant is more clearly intrastate commerce than the distribution of oil involved in the *Atlantic Coast Line* case for two reasons —(1) the milk originating from without the State is commingled with milk produced within the State of Illinois; (2) the milk is put through a processing operation at the

pasteurization plant, including pasteurization, cooling, bottling "and otherwise prepared for distribution," which was lacking in the oil case.

The facts involved in the *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495, are also comparable to those alleged in the indictment filed in this case. In that case poultry which had been purchased in interstate commerce was held to have finally come to rest within the state, upon delivery to the defendants for slaughtering. It was decided that when the poultry was trucked to the slaughter houses in Brooklyn the interstate aspect of the transaction ended; that no "current" or "flow" of interstate commerce continued to subject subsequent transactions to congressional regulation (p. 542); that the so-called "throat of commerce" cases were not applicable to a commodity which had come to rest within the state and was not destined for transportation to other states (p. 543).

A similar conclusion was reached in *Lipson* v. *Socony Vacuum* (C. C. A. 1), 76 F. (2d) 213, 218, in an action under the Clayton Act for treble damages, where it was held that interstate commerce in gasoline ended when it was received by defendants in Massachusetts for storage, and that sales and deliveries from storage thereafter made in Massachusetts to retail customers were sales in intrastate commerce.

The case of *H. P. Hood & Sons* v. *Commonwealth,* 235 Mass. 572, 127 N. E. 497, 499, involved the validity of a state income tax. The question presented was whether sales of fluid milk by the Hood Company in Boston were sales in interstate commerce when the milk had originated outside the state. The case is particularly apposite for the reason that the methods used by the Hood Company in processing and handling the milk, described in the opinion, are identical with those described in the indictment

in this case. The court recognized that the part of the milk company's business which consisted of transporting the milk to Boston from states other than Massachusetts was clearly interstate commerce but that the "handling" at its plants closely resembled "manufacture" and every step thereafter in the sale of such milk was an intrastate affair, the income from which was subject to the taxing power of the commonwealth (p. 499).

It thus appears from analogous decisions that when milk produced outside the State is delivered to pasteurizing plants in the City of Chicago, where it is mixed with milk originating within the State, pasteurized, cooled, bottled, etc., interstate commerce is at an end and the distribution of the processed milk to the consumer is purely intrastate commerce.

The gas cases demonstrate how little is required to remove a commodity once traveling in interstate commerce from such commerce. In *Pennsylvania Gas Co.* v. *Public Service Commission,* 252 U. S. 23, it was held that the transportation and sale of natural gas produced in one state and then transported and furnished directly to the consumers in a city of another state, by means of pipelines from the source of supply, was interstate commerce, but that holding was overruled in *Missouri* v. *Kansas Gas Co.,* 265 U. S. 298, 308, and *East Ohio Gas Co.* v. *Tax Commission,* 283 U. S. 465, 471. These and similar cases have now established that if a pipeline company, engaged in interstate commerce, after receipt at its distribution plants, supplies gas to domestic consumers, that portion of its business which involves the delivery of the gas to the burner tips after reduction of pressure and delivery into the local mains is *intrastate* commerce and subject to State regulation. It is not necessary that there be any storage of gas, or that the movement of the gas in the mains be inter-

rupted. The interstate movement ends with the reduction of pressure and delivery of gas into the local mains.

The cases relied upon by these defendants and discussed in this brief demonstrate that interstate commerce ceased upon the delivery of the milk, previously moving in interstate commerce, to the plants of the distributors.

B. The Regulation of Purely Intrastate Transactions in a Commodity is Only an Indirect and Remote Interference with Interstate Commerce.

It may readily be seen that regulation of intrastate transactions in reference to a commodity which has an extra state origin may have a very real effect on the volume of local sales and indirectly upon the volume of interstate commerce in such community. The power of the several states to regulate local commerce has, however, never been denied except in so far as it is limited by the "equal protection" clause of the Fourteenth Amendment to the constitution. The cases hold that interference with interstate commerce after the interstate movement has ended is such a remote and indirect interference with interstate commerce that jurisdiction rests solely in the state where transactions took place. They may be classified as follows:

(1) *Price Fixing Cases.* It has been held that a state may fix the local retail price of gas previously transported in interstate commerce. *Public Utilities Comm'n* v. *Landon*, 249 U. S. 236, 245; *Missouri* v. *Kansas Gas Co.*, 265 U. S. 298, 308, 309; *Pennsylvania Gas Co.* v. *Public Service Commission*, 252 U. S. 23, 29. *Missouri* v. *Kansas Gas Co.* has been discussed on page 31 of this brief. *Public Utilities Commission* v. *Landon* was a case in which the receivers of an interstate gas company sought to enjoin the Public Utilities Commissions of Kansas and Missouri, certain municipalities and many local gas companies from interfering with the establishment and maintenance of rates for selling

gas to consumers. This Court held that regulation of the rates chargeable by local distributing companies had but an indirect effect upon the interstate business of the transporting and selling company, even though the interstate business consisted exclusively of selling the gas to the local companies. Further, it held that the lower court was in error in assuming that interstate commerce had not ceased when the gas passed into the local mains and that as a result of this termination of such commerce the power of the Public Service Commission to set the burner-tip price could not be denied.

(2) *Freight Rate Cases.* It has been held that the regulation of freight rates for a commodity which had previously moved in interstate commerce does not constitute a direct burden on interstate commerce. In *Gulf, Colorado & Santa Fe Ry. Co.* v. *Texas*, 204 U. S. 403, it was held that an interstate shipment, on reaching the point specified in the original contract of transportation, ceased to be an interstate shipment, and its further transportation to another point within the State on the order of the consignee was controlled by the law of the State, and not by the Interstate Commerce Act, and that the State, through its commerce commission, might properly set rates for the local transportation of the goods which had previously moved in interstate commerce.

See also the case of *Atlantic Coast Line Railroad Co.* v. *Standard Oil Co.*, 275 U. S. 257, previously discussed on page 29 of this brief, where the Court held that intrastate transportation of the oil after it had been unloaded from boats moving in interstate and foreign commerce should be governed by intrastate rates.

(3) *Tax Cases.* A State may impose an excise tax on gross receipts from income derived from the sale of goods previously moving in interstate commerce, or require the

payment of an occupational tax measured by the volume of such sales. The leading case on this subject is *East Ohio Gas Co.* v. *Tax Commission*, 283 U. S. 465, 470, 472, discussed *supra* in this brief. See also *Hart Refineries* v. *Harmon*, 278 U. S. 499, 501, where it was held that a State might tax the use as well as the sale of gasoline which had been imported into the State and had come to rest there. In the *Hart* case this Court, in discussing *Sonneborn Bros.* v. *Cureton*, 262 U. S. 506, decided that, interstate transportation having ended, the taxing power of the state over the commodity transported might, so far as the commerce clause of the Federal Constitution was concerned, be exerted in any way which the state's constitution and laws permitted provided, of course it did not discriminate against the commodity because of its extrastate origin.

See also *Hood & Sons* v. *Commonwealth*, 235 Mass. 572, 127 N. E. 497, discussed *supra*, in which a state income tax, measured by the volume of local sales of milk brought in from outside the State of Massachusetts, was held valid. Compare these cases with *Ozark Pipeline* v. *Monier*, 266 U. S. 555, in which a tax was held invalid because the business of the company was purely interstate.

The philosophy of each of the classes of cases cited above is the same. In each case where state regulation, state price fixing, or state taxation was permitted, interstate commerce had ceased and only intrastate commerce was directly involved. The effect on interstate commerce was indirect and remote.

Indirect or remote restraint should not be confused with the actual effect of the restraint. In the *Landon* case, the indirect restraint complained of was such as to completely destroy the interstate commerce involved. However, the court held that the restraint was nonetheless indirect and beyond the jurisdiction of the Federal Government. It is

not the degree of restraint, but whether it operates directly or indirectly upon interstate commerce that determines its legality.

Restraints, to be cognizable under the Sherman Act, must be direct and immediate. The cases cited above demonstrate that any interference with the distribution of goods originating outside of the state, after the interstate movement has ended, is an incidental, indirect and remote restraint of interstate commerce. The effect of fixing arbitrary and non-competitive prices for sales of milk in the City of Chicago may or may not affect the incentive to purchase. However, any incentive thus eliminated would not result in a direct burden on interstate commerce, and consequently, is not illegal under the Sherman Act. This proposition is conclusively demonstrated by numerous Supreme Court decisions, a few of which will be considered.

Levering & Garrigues Co. v. *Morrin*, 289 U. S. 103, involved a combination to unionize certain building operations by stopping work on the buildings. This resulted in the contractor discontinuing interstate shipments of materials. Interstate commerce was thus restrained, just as it is conceivable that local price fixing as alleged in the indictment might cause a diminution in interstate commerce in milk. The Supreme Court held that the incidental interference with the interstate movement of materials in the *Levering* case was not prohibited by the Sherman Act because *the sole aim of the conspiracy was to halt or suppress local building operations as a means of compelling the employment of union labor* and not for the purpose of affecting the sale or transit of materials in interstate commerce. That use of the materials was purely a local matter, and the suppression thereof the result of the pursuit of a purely local aim. *Restraint of interstate commerce was not an object of the conspiracy. Prevention of the*

local use was in no sense a means adopted to effect such a restraint. It was this exclusively local aim, and not the fortuitous and incidental effect upon interstate commerce, which gave character to the conspiracy (p. 107).

Industrial Association of San Francisco v. *United States*, 268 U. S. 64, involved facts similar to those in the last preceding case. The court found that there was no interference with the freedom of the outside manufacturer to sell and ship, or to the local contractor to buy. The process went no further than to take away the latter's opportunity to use and, therefore, his incentive to purchase. The court then decided that the effect upon, and interference with, interstate trade, if any, were clearly incidental, indirect and remote (p. 80).

C. The Indictment Charges no Intent to Restrain Interstate Commerce and any Restraint Which May Have Been Caused by the Acts Charged is Only Incidental, Indirect and Remote and Not Such a Restraint as is Prohibited by the Sherman Act.

It has thus far been demonstrated that the allegations of the indictment show that interstate commerce ceased upon the delivery of the milk previously moved in interstate commerce to the plants of the distributors in the City of Chicago. Further, that regulation of purely intrastate transactions in connection with a commodity, which had moved in interstate commerce but the movement having terminated, resulted only in an indirect and remote interference with such commerce not cognizable under the Sherman Act.

These defendants, however, recognize that a combination and conspiracy entirely local in nature may violate the provisions of the Sherman Act if the intended effect of the acts of the conspirators is to restrain interstate commerce. The existence of such intention to restrain interstate commerce may be specifically charged, or a presumption of

such intention may arise from the inherent nature of the means adopted to effectuate the conspiracy.

It is apparent from a careful study of the indictment that no specific intent to restrain interstate commerce is alleged. Consequently, if the activities of the defendants charged in Count Two of the indictment, which are specifically limited in operation to sales of milk entirely intrastate in nature "in the City of Chicago" (R. 17, 20), are to constitute a violation of the Sherman Act, it must be upon the ground that the means alleged to have been adopted by the defendants to effectuate the conspiracy, were such as to raise a presumption due to their inherent nature of an intent to restrain interstate commerce.

The distinction sought to be called to the attention of the court is, we feel, most clearly shown by a comparison of the cases of *Levering & Garrigues Company* v. *Morrin*, 289 U. S. 103, previously discussed herein, and *Bedford Company* v. *Stone Cutters' Assn.*, 274 U. S. 37. In the former case it was sought to unionize the local craftsmen performing labor entirely within the state where strikes had been called to achieve the announced purpose of the union leaders. The refusal to continue the work previously started, it was charged, caused a restraint of interstate commerce by stopping the use of various articles which were moving in interstate commerce. The opinion stated that "the sole aim of the conspiracy was to halt or suppress local building operations as a means of compelling the employment of union labor", and further that "restraint of interstate commerce was not an object of the conspiracy, prevention of the local use was in no sense the means adopted to effect such a restraint" and that the restraint of such commerce was merely "fortuitous and incidental" and held that the resulting restraint was incidental, indirect and remote and therefore not within the anti-trust act (p. 107).

Into this same class of cases fall *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344; *United Leather Workers* v. *Herkert & Meisel Trunk Company*, 265 U. S. 457; *Industrial Association of San Francisco* v. *United States*, 268 U. S. 64, and many others.

On the other hand, in the *Bedford Stone* case, *supra*, the announced purpose of the conspiracy was to unionize the quarrymen employed in the Indiana quarries. The means adopted were strikes, which would paralyze building operations throughout the country outside of Indiana, thus limiting the sales of non-union cut stone and causing damage to the interstate commerce carried on by the sellers of such cut stone for the purpose of causing such cut stone sellers, through pressure caused by the loss of interstate markets, to capitulate and employ union labor at their Indiana quarries. It is clear in this case that the motive of the conspirators was "to unionize the cutters and carvers of stone from quarries" (p. 47) and further, that "the strikes were directed against the use of petitioner's product in other states with the plain design of suppressing or narrowing the interstate market". The conspirators unquestionably did not intend to restrain interstate commerce as an end in itself but they did intend this restraint as an essential step in the accomplishment of their designs and the success of the plan depended upon such result.

The type of case represented by the Bedford Stone case includes such cases as the second *Coronado* case, *Coronado Company* v. *United Mine Workers*, 268 U. S. 295; *United States* v. *Brims*, 272 U. S. 549; *Local 167* v. *United States*, 291 U. S. 293; *Loewe* v. *Lawlor*, 208 U. S. 274; *Boyle* v. *United States*, 259 Fed. 803.

Where the acts of persons involved in a conspiracy are local in character but the intent is to restrain interstate commerce and the means employed are calculated to carry

that intent into effect, a violation of the anti-trust laws necessarily results. Interstate commerce is the direct object of the attack and the restraint of such commerce is the necessary consequence of the acts and the immediate end in view. The distinction between direct and indirect effects has been clearly recognized in the application of the Anti-trust Act. Where a combination or conspiracy is formed, with the intent to restrain interstate commerce or to monopolize any part of it, the violation of the statute is clear. But where the intent is absent, and the objectives are limited to intrastate activities, the fact that there may be an indirect effect upon interstate commerce does not subject the parties to the federal statute, notwithstanding its broad provisions. *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 547. This same distinction was recognized in the case of *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 304.

There being no charge in the indictment of a specific intent to restrain interstate commerce, the local character of the conspiracy charged in Count Two of the indictment can be construed to involve a restraint of interstate commerce prohibited by the Sherman Act, only if the means adopted demonstate such a direct restraint as to raise a presumption of intent to obstruct such commerce.

The district court in its opinion found that the means charged in Count Two of the indictment, were set forth in paragraphs 65 to 74, inclusive. (R. 101.) It is apparent upon reading paragraphs 65 to 67, inclusive (R. 17, 18), that they state only activities of the same local nature as those less specifically described in paragraph 63.

Paragraph 68 (R. 18) states that the Pure Milk Association refused to sell milk to distributors who did not maintain the resale prices determined by the alleged conspirators. Even if the Pure Milk Association was dealing in interstate commerce in these

sales, which we submit it was not, the acts charged nevertheless seem entirely legal under the doctrine of *United States* v. *Colgate Co.*, 250 U. S. 300, which holds that the refusal to sell except to individuals who maintain resale prices, is perfectly legal. The trend of legislation to protect this right is illustrated by the Miller-Tydings Amendment to Section 1 of the Sherman Act and in Illinois, Wisconsin, Indiana and Michigan by state statutes approving resale price maintenance.

Paragraph 69 (R. 18) is merely a statement of the manner in which the particular prices were arbitrated in two instances.

The activities of the Bottle Exchange, set forth in paragraph 70 (R. 18), are of course purely local in nature and can by no stretch of the imagination be said to have had a direct effect upon interstate commerce.

Before commenting on paragraph 71 (R. 19), which contains allegations of the activities of Local 753, we wish to direct the attention of the court to the construction of the indictment contained in the opinion of the district court, wherein that court said, "the indictment is lacking as to averments or allegations as to the origin of fluid milk sold by stores or by independent distributors" (R. 113), and further, "it is only by such intendment or inference that the court could conclude that the stores and independent distributors whose system of distribution the defendants are alleged to have controlled, sold fluid milk which was or had been the subject of interstate commerce". (R. 113)

It is to be noted that by paragraph 11 of the indictment, an independent distributor is defined as any distributor other than a major distributor (R. 2); that by paragraph 10 of the indictment a major distributor is defined as any distributor named as a defendant in the indictment. (R. 2) Thus, it appears that any

direct interference with transportation of milk to distributors who refused to maintain prices fixed by the alleged conspirators, upon the interpretation of the indictment contained in the opinion of the district court, would be an interference with the transportation of *milk, the origin of which is unknown.* And, as said in that opinion, to assume that that milk was traveling in interstate commerce is to indulge in intendment and inference which has been condemned in criminal pleading in the case of *Pettibone* v. *United States,* 148 U. S. 197. Thus, it appears that the actual interference with transportation charged in paragraph 71 is, for aught that appears in the indictment, only an interference with local transportation of milk.

Paragraphs 72 and 73 (R. 19) merely set forth additional facts regarding the activities of the union and are important solely in showing the connection of Leslie G. Goudie and Daniel A. Gilbert with these activities; and show purely local actions.

Paragraph 74 (R. 20), setting forth the activities of the officials of the Board of Health of the City of Chicago, again charges acts which can only be said to involve interstate commerce by inference. For aught that appears in that paragraph read in the light of the other paragraphs of the indictment, and the interpretation of the indictment by the District Court, the activities there set forth affected only farms located within Illinois whose milk never travelled across state lines.

The conspiracy to set "arbitrary and non-competitive" prices being local in nature, did not state a crime cognizable under the Sherman Act. Only if the means adopted to effectuate the conspiracy were such as to fall within the regulatory power of the Federal congress under the commerce clause of the constitution could the conspiracy itself be so tainted by their illegality that it, too, would fall

within that power. We submit that, following the interpretation of the indictment found in the opinion of the District Court, the origin (from what state) of the milk sold to and transported to independent distributors who refused to maintain prices is not stated. This Court then must find that no means are stated which would render the otherwise local conspiracy subject to congressional regulation under the Sherman Act or any other Federal statute.

These defendants readily concede that the charges contained in Count Two of the indictment may well state a crime under the anti-trust laws of Illinois; but, as said in the case of *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 248,

> "In brief, their right to combine • • • in their own state could not be reached by the Federal power derived from the commerce clause in the constitution."

We respectfully submit that the acts charged in Count Two of the indictment fail to show that they affected interstate commerce directly and that any effect they might have had upon interstate commerce was merely fortuitous and incidental. As no intent to restrain such commerce is charged or can be presumed the acts charged do not fall within the condemnation of the Sherman Act.

V.

COUNT FOUR OF THE INDICTMENT FAILS TO STATE FACTS WHICH SHOW THAT THE BASE-SURPLUS PLAN RESTRAINS INTERSTATE COMMERCE.

In Count Four the conspiracy charged is a combination among the various defendants to impose the base-surplus plan of production upon the Chicago Milk Shed, an area described in paragraphs 1-47 of the indictment. It is the contention of the government that the result of the base-surplus plan was to limit and reduce the supply of fluid milk

flowing in the channels of interstate commerce into the City of Chicago and that as a consequence the conspiracy to impose the plan on milk producers constituted a violation of the Sherman Act. It is the contention of the defendants that the base-surplus plan, as set forth in the count, could not have the effect of imposing any restraint on production and hence on interstate commerce in milk. It is the further contention of the defendants that, even conceding that the base-surplus plan might result in a diminution in the amount of milk produced, such restraint relates to production only, and is too remote and indirect to come under the condemnation of the Act.

By way of preface, we ask the court's indulgence in referring briefly to the reasons and circumstances impelling the adoption of the base-surplus plan in the Chicago Milk Shed, reasons which apply with equal force to its adoption by the great majority of producers in the United States.

Prior to the time the base-surplus plan was adopted by farmer producers, the supply of milk in the Chicago Milk Shed was subject to wide seasonal variations. Substantially all the cows in the area were "freshened" in the spring of the year, resulting in a large surplus or "flush" of milk in the spring and summer months, which had a tendency to depress prices and demoralize the producer market, and an acute scarcity of milk in the late fall and winter months. The base-surplus plan in its operation pays the farmer a premium for stabilization of production. Thus a farmer, to hold his base, must at all times of the year within certain limits, maintain his production above designated minimum levels by having his cows "freshened" at different periods throughout the year, the converse result of which is to equalize the surplus produced beyond the base so that there is no vast over-production in some months and a corresponding under-production in others.

The plan was so successful in its operation that it was made an integral part of the licenses for milk issued by the Secretary of Agriculture for the Chicago Milk Shed during the period from August 1, 1933 until March 2, 1935, when the producers and distributors in that area operated under such licenses. It was thereafter retained in subsequent agreements between the Pure Milk Association and the distributors after March 2, 1935. It has also been incorporated in the majority of the milk licenses issued in other milk sheds throughout the country by the Secretary of Agriculture under the Agricultural Adjustment Act. The intent and actual operation of the plan was, and is not to restrain, but to equalize production.

A. Count Four Fails to Demonstrate Any Restraint on Interstate Commerce.

The restraint on which the government relies to sustain the Count is found in paragraph 99 (R. 29), in which it alleged that the defendants:

> "• • • pursuant to and in execution of said combination and conspiracy have contracted to buy and to sell and have bought and sold within said district large quantities of fluid milk produced on approved dairy farms located in the states of Illinois, Indiana, Michigan and Wisconsin, in accordance with the base surplus plan of production and payment aforesaid. The said base surplus plan of payment was intended to and does restrict, limit and control, restrain and obstruct the supply of fluid milk entering the City of Chicago by arbitrarily limiting the quantity of fluid milk for which a member producer may be paid the base price as aforesaid."

Supplementing this allegation are sub-paragraphs (a), (b), (c), (d) and (e) of paragraph 90 (ii), (R. 26), which describe in general terms the base-surplus plans. From an examination of this description of the plan it is plain that the restraint on which the government relies as the essence

of the conspiracy lies in the price differential between base and surplus milk, that is, that the farmer received one price for milk sold in Chicago as fluid milk and another for milk produced in excess of the fluid milk requirements of the distributors with which the Pure Milk Association had contracts. In paragraph 90 (ii) (e) the government states its reasons why such price differential would result in a diminution of production or supply and a consequent restraint on interstate commerce in milk. It is there stated that the differential in price between base and surplus milk had the effect of "diminishing initiative and economic incentive of member producers to produce on approved dairy farms and to offer for sale in the City of Chicago any fluid milk in excess of the amount prescribed as their base by the Pure Milk Association and the major distributors."

It is to be noted that the foregoing is the only language in the count from which it could be concluded that the base-surplus plan restrained interstate commerce.

That this statement represents a conclusion based on an invalid premise is apparent on analysis. It is nowhere contended in the count that farmers producing under the plan received less for milk sold by them as surplus milk than farmer producers not operating under the plan received for all milk produced by them—nor is it contended that the return to the farmer for surplus milk was below or so close to the cost of production as to render its production unprofitable. Unless these unwarranted assumptions are indulged no reason either by implication or necessary inference exists why the "initiative and economic incentive" of the farmer to produce milk would be diminished by operation of the plan. It is equally consistent to assume (as indeed is the fact) that the base price constitutes a premium price for milk in that category.

What differential existed between base and surplus milk or what the actual prices were from time to time paid for milk in various categories nowhere appears. In point of fact, both the prices paid and the "spread" have varied frequently during the time the plan has been in operation as new agreements have been entered into between the producers and distributors. Nor is the relation between prices paid for milk in various categories under the plan and those paid to producers not operating under the plan set out even by way of generality.

Actually prices obtained by the farmer for milk not produced under the plan vary widely depending on the market the farmer has for his product. If he has a fluid milk outlet he obtains one price; if he is compelled to sell to a condensery or cheese factory, another; if he separates the cream on the farm, feeds or sells the skim and ships the cream to market, still another. All of these factors, highly complicated by questions of outlet and supply, affect the relation between the prices from time to time determined for surplus milk under the base-surplus plan and the price the farmer might have obtained for such milk had it been sold on the open market.

The use of price as a criterion of legal or illegal conduct, when based on conjecture as to what factual situation would have obtained had prices been otherwise, has been condemned by the courts. Thus, in *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, Justice Holmes held that to set a standard of legality dependent on questions of fluctuating and unstable prices was to set a standard beyond the reach of mankind (223).

In *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, the court held unconstitutional the Lever Act (1919) in which it was made unlawful for any person "to make any

unjust or unreasonable rate or charge in handling or dealing in or with any necessities" or "to exact excessive prices for necessaries." The court held that an attempt to enforce such statute would be the exact equivalent of an effort to carry out a statute which in terms, merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury (p. 89).

Similarly, in *United States* v. *Trenton Potteries*, 273 U. S. 392, the court held that in the absence of express legislation they would not adopt a construction making the difference between legal and illegal conduct depend on whether prices were reasonable or not (398).

It is then submitted that no restraint on interstate commerce is implicit in the alleged conspiracy to impose the base-surplus plan on producers in the Chicago Milk Shed and that the count in alleging such agreement totally fails to show that the necessary or probable result of the combination charged would be a restraint on such commerce.

B. The Unsupported Conclusion of a Restraint Shows Restraint (if any) of Production, Not of Commerce, and Any Effect That it Might Have on Commerce Would be Remote, Indirect and Secondary.

Conceding for the sake of argument that the allegations of Count Four show a restraint on production (although the defendants vigorously insist that this is not true), nevertheless, such restraint would be insufficient to support a charge of violation of the Sherman Act. If the base-surplus plan could be said to impose a restraint, such restraint would, of necessity, be confined to a diminution of the supply of milk produced on the farms. It is not alleged that the effect or intent is totally to prevent production. The indictment states that in excess of 1,000,000 quarts of milk are sold daily in Chicago. But,

it is contended, the plan operates to reduce the supply of milk that would, except for such restraint, move to Chicago.

It has never been seriously contended that production is, *per se*, commerce, and amenable to Federal regulation. The true rule is found in *United Leather Workers International Union* v. *Herkert & M. Trunk Co.*, 265 U. S. 457, 471. In that case it appeared that the defendants conspired to unionize certain manufacturing ventures by preventing manufacturing operations. The means employed to stop operations included strikes, illegal picketing and intimidation. The result of the combination was to stop the stream of interstate commerce originating at the factories. It was stated in the opinion that the conspirators knew that the combination, if successful, would prevent interstate commerce. The court nevertheless there held that the restraint was not one prohibited by the Sherman Act.

Count Four neither shows nor charges a monopoly of supply, an attempt to control the price of the commodity after production and while in interstate commerce, nor any discrimination between would-be purchasers. It is not charged that the intent was to keep the milk out of interstate commerce when produced or that the intent to reduce production was ancillary and subordinate to an attempt to prevent its movement in commerce. It is alleged that the primary intent was to restrain production by means of the base-surplus plan—one incidental effect of which might be to reduce the milk moving in interstate commerce as in any case where production is limited. Such a restraint has consistently been held incidental, indirect and remote and not a violation of the Sherman Act.

In *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344, sometimes called "the first Coronado case", a conspiracy was formed to prevent the mining of coal. A large

percentage of the coal taken from the mines had previously moved in interstate commerce, and the result of the combination was to completely destroy such commerce. The court held that neither the combination nor the resulting restraint was prohibited by the Sherman Act.

In the instant case, we are not dealing with the fabrication of a manufactured article but the production on the farm of an agricultural commodity. The situation does not involve interstate commerce except in so far as a subsequent movement in interstate commerce might be affected by a failure to produce. The factual situation is thus essentially the same as that in the case of *United States* v. *Butler*, 297 U. S. 1, involving the validity of the Agricultural Adjustment Act of 1933, in which it was conceded, in both the majority and minority opinion, and almost without discussion, that the fact that an agricultural commodity might later move in interstate commerce did not give the Government jurisdiction over its production or make such production amenable to rules and regulations promulgated by the Secretary of Agriculture.

We submit that, even conceding that the base-surplus plan of production would, by its operation, involve a diminution of supply (which is denied), nevertheless such a reduction would not, under the charges of the indictment, constitute a restraint cognizable under the Sherman Act.

C. It Does Not Appear that if More Surplus Milk Were Produced Such Surplus Would be Available as and Sold as Fluid Milk in the Chicago Market.

It is nowhere charged that had more milk been produced by member producers of the Pure Milk Association, such excess milk would have moved in the channels of interstate commerce to the Chicago market. The statement in

paragraph 90(e) of the indictment, that the differential in price between base and surplus milk diminished *initiative and economic incentive* of member producers "to produce on approved dairy farms and to offer for sale in the City of Chicago any fluid milk in exess of the amount prescribed as their base by the Pure Milk Association and the major distributors" is far from such positive statement as is required to charge that such milk, if produced, would move in interstate commerce to the City of Chicago. It is equally possible to assume (as indeed is actually true of substantially all surplus milk produced under the base-surplus plan) that none of the theoretical additional surplus apparently anticipated by the Government, but for the plan, would be transported and offered for sale as fluid milk in the Chicago market. It is apparent that the Government makes the assumption that it would, but such assumption is far from the positive averment required to sustain the indictment against demurrer.

D. The Means Stated Do Not Render the Combination Charged Illegal Under the Sherman Act.

In the preceding sections of this heading we have dealt with what the defendants conceive to be the basis for the charge of conspiracy raised by the count, namely—a restraint on interstate commerce caused by the adoption of the base-surplus plan of production in agreements entered into between the Pure Milk Association and the so-called major distributors. We have demonstrated that the allegations of the count are not sufficient to show any restraint on interstate commerce by its operation and beyond that, that if by any inference or intendment the court could conclude that any restraint was implicit in its operation, such restraint was incidental, remote and not within the purview of the Sherman Act.

The ultimate object of the conspiracy charged not being

illegal under the Sherman Act, if the count is to be sustained the violation must be found in allegations of illegal means found in the count. That is to say, means illegal in themselves and independently calculated to restrain interstate commerce must be alleged to taint with illegality the alleged conspiracy to impose the base-surplus plan on the Chicago Mil: Shed. Paragraphs 90 to 98 contain charges that the lefendants did certain acts which for the purpose of this rief will be considered to constitute the means and methods by which the conspiracy charged was to be effected, since this interpretation was placed on them by the trial court, although it might well be contended that overt acts in pursuance of the alleged conspiracy are alone charged in these paragraphs. In paragraph 90, the Pure Milk Association is charged with the imposition of the base-surplus plan upon member producers, except for the allegations contained in sub-paragraph v, which will be considered later. In paragraph 91 the major distributors are charged with entering into agreements with the Pure Milk Association, imposing the base-surplus plan of production upon member producers and assisting the Pure Milk Association in building up and holding their membership. In paragraphs 92 to 98 the defendants, W. A. Wentworth, Leland Spencer, Associated Milk Dealers, Inc., the Bottle Exchange, Local 753, Leslie G. Goudie, Daniel A. Gilbert, Herman N. Bundesen, Paul Krueger and William J. Guerin are charged, in essence, with assisting the Pure Milk Association, in concert with the other defendants, in holding and building up its membership and imposing the base-surplus plan on milk producers in the Chicago area. With the possible exception of the charge contained in sub-paragraph iii of paragraph 95, which will be dealt with later, none of the means and methods alleged to have been adopted to effect this end were of and by themselves calculated to result in any restraint of inter-

state commerce in milk, and hence of themselves illegal under the Sherman Act, although certain of these acts might have been subject to prosecution by the appropriate local authorities. It is then submitted that (disregarding for the moment the subparagraphs above referred to) the object not being illegal under the Act, and the means of themselves not illegal thereunder, no basis exists under the charges contained in Count Four for sustaining this count of the indictment. In any conspiracy formed with an object not illegal in itself under the Sherman Act, such as compelling membership in the Pure Milk Association, Chicago Chamber of Commerce, or any other association, the means used to effect and coerce such membership cannot bring the conspirators under the Act unless the means themselves are illegal thereunder.

In subparagraph v of paragraph 90, and subparagraph iii of paragraph 95, it is charged that certain acts were done by the Pure Milk Association and Local 753 to hinder and prevent the transportation and delivery of fluid milk to the city of Chicago. It is, however, nowhere stated in the count that the milks so prevented from moving into Chicago by the acts of the defendants set forth in the foregoing subparagraphs, had an extra state origin and it is only by the widest use of intendment and inference that such an allegation could be supplied. In default of such direct allegation that the milk so prevented from moving to Chicago came from without the state, no means illegal under the Sherman act are stated in these subparagraphs and it is submitted that they, in common with the allegations of the alleged means found in the remaining paragraphs and subparagraphs of the count, form no basis for any prosecution under Section 1 of the Sherman Anti-trust Act.

For the reasons stated in the first division of this brief, this Court may and should consider the points herein urged in support of the judgment of the lower court dismissing the indictment; and the judgment should be affirmed.

Respectfully submitted,

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APPENDIX A

Analysis of Milk Licenses, Orders and Agreements Promulgated and Approved by the Secretary of Agriculture under the Agricultural Adjustment Act, as amended

Market	Type of Instrument	Effective Date
Arizona		
*Phoenix	License No. 91	11/10/34
Phoenix	Amended License No. 91	8/16/35
Tucson	License No. 99	4/16/35
California		
*†Alameda County	Agreement No. 22	11/ 7/33
*†Alameda County	License No. 16	11/14/33
*†Alameda County	License No. 63	7/ 1/34
*†Alameda County	Amended License No. 63	1/20/35
*†Los Angeles	Agreement No. 23	11/17/33
*†Los Angeles	License No. 17	11/20/33
*†Los Angeles	Licehse No. 57	6/ 1/34
*†Los Angeles	Amended License No. 57	12/16/34
*†Los Angeles	Amended License No. 57	2/28/35
†Los Angeles	Amendment to Amended License No. 57	3/28/35
*†San Diego	Agreement No. 31	12/15/33
*†San Diego	License No. 24	12/18/33
*†San Diego	License No. 98	2/ 1/35
†San Diego	Amended License No. 98	6/19/35
†San Francisco	License No. 89	10/ 2/34
Colorado		
Denver	License No. 85	9/ 1/34
Denver	Amended License No. 85	4/ 3/35
District of Columbia		
†D. C.	Order No. 11	9/21/36
Georgia		
†Atlanta	License No. 93	12/ 1/34
†Atlanta	Amended License No. 93	8/ 3/35
*†Savannah	License No. 84	8/16/34
†Savannah	Amended License No. 84	10/15/34
†Savannah	Amended License No. 84	3/ 1/35
Illinois		
*†Chicago	Agreement No. 1	8/ 1/33
*†Chicago	License	8/ 1/33
†Chicago	License No. 30	6/ 1/34
†Southern Ill.	License No. 90	11/ 1/34
Indiana		
*†Evansville	Agreement No. 18	10/23/33
*†Evansville	License No. 12	10/23/33
†Evansville	License No. 34	2/26/34
†Evansville	Amended License No. 34	11/25/34
†Evansville	Amended License No. 34	7/24/35
Fort Wayne	License No. 64	7/ 1/34

* Resale prices fixed.
† Base-surplus plan adopted.

Analysis of Milk Licenses, Orders and Agreements Promulgated and Approved by the Secretary of Agriculture under the Agricultural Adjustment Act, as amended

—Continued — Page 2

Market	Type of Instrument	Effective Date
Indiana (continued)		
Fort Wayne	Amended License No. 64	6/19/35
†Fort Wayne	Agreement No. 69	2/ 1/37
Fort Wayne	Order No. 32	10/15/38
Indianapolis	License No. 45	4/ 1/34
†La Porte Co	Order No. 20	11/13/37
Iowa		
* Des Moines	Agreement No. 19	10/25/33
* Des Moines	License No. 13	10/28/33
* Des Moines	License No. 31	2/14/34
* Des Moines	Amended License No. 31	5/ 5/34
* Des Moines	Amended License No. 31	12/ 5/34
Dubuque	License No. 94	12/ 5/34
* Dubuque	Amended Order No. 12	6/16/39
Dubuque	Order No. 12	10/ 1/36
* Sioux City	License No. 43	3/17/34
* Sioux City	Amended License No. 43	5/16/34
Sioux City	Amended License No. 43	7/18/35
Kansas		
*†Leavenworth	License No. 56	5/16/34
*†Leavenworth	Amended License No. 56	12/16/34
†Leavenworth	Amendment to Amended License No. 56	6/20/35
* Topeka	License No. 92	11/10/34
Topeka	Amendment to License No. 92	6/14/35
†Topeka	Amended License No. 92	7/16/35
†Topeka	Agreement No. 68	8/16/36
*†Wichita	License No. 44	3/17/34
*†Wichita	Amended License No. 44	5/16/34
*†Wichita	Amended License No. 44	8/18/34
*†Wichita	Amended License No. 44	1/21/35
†Wichita	Amended License No. 44	8/15/35
Kentucky		
*†Lexington	License No. 53	5/ 2/34
*†Lexington	Amended License No. 53	9/ 1/34
*†Louisville	License No. 60	6/ 1/34
†Louisville	Amended License No. 60	8/17/35
Louisiana		
*†New Orleans	Agreement No. 20	10/28/33
*†New Orleans	License No. 14	10/31/33
* New Orleans	License No. 42	3/17/34
Maryland		
*†Baltimore	Agreement No. 9	9/29/33
*†Baltimore	License No. 6	9/29/33
†Baltimore	License No. 80	8/ 1/34

* Resale prices fixed.
† Base-surplus plan adopted.

Analysis of Milk Licenses, Orders and Agreements Promulgated and Approved by the Secretary of Agriculture under the Agricultural Adjustment Act, as amended

—Continued — Page 3

Market	Type of Instrument	Effective Date
Massachusetts		
*†Boston	Agreement No. 21	11/ 3/33
*†Boston	License No. 15	11/ 3/33
†Boston	License No. 38	3/16/34
†Boston	Amended License No. 38	2/24/35
†Boston	Amended License No. 38	5/ 1/35
Boston	Amended License No. 38	7/16/35
†Boston	Order No. 4	2/ 9/36
†Fall River	Amended License No. 48	4/ 1/34
†Fall River	Amended License No. 48	9/ 1/34
†Fall River	Amended License No. 48	4/ 9/35
†Fall River	Order No. 5	5/ 1/36
Lowell-Lawrence	Order No. 34	2/12/39
†New Bedford	Amended License No. 49	4/ 1/34
†New Bedford	Amended License No. 49	9/ 1/34
†New Bedford	Amended License No. 49	4/ 6/35
Michigan		
†Ann Arbor	License No. 65	7/ 1/34
†Ann Arbor	Amended License No. 65	12/20/34
†Ann Arbor	Amended License No. 65	5/ 1/35
†Battle Creek	License No. 66	7/ 1/34
†Battle Creek	Amended License No. 66	12/20/34
†Bay City	License No. 67	7/ 1/34
*†Detroit	Agreement No. 4	8/27/33
*†Detroit	License No. 4	8/27/33
†Detroit	License No. 50	4/ 1/34
†Detroit	Amended License No. 50	11/ 5/34
†Detroit	Amended License No. 50	5/ 6/35
†Flint	License No. 68	7/ 1/34
†Grand Rapids	License No. 69	7/ 1/34
†Grand Rapids	Amended License No. 69	11/ 5/34
†Grand Rapids	Amended License No. 69	5/ 1/35
†Kalamazoo	License No. 70	7/ 1/34
†Kalamazoo	Amended License No. 70	12/16/34
†Kalamazoo	Amended License No. 70	5/ 1/35
†Lansing	License No. 71	7/ 1/34
†Lansing	Amended License No. 71	11/ 5/34
†Muskegon	License No. 72	7/ 1/34
†Muskegon	Amended License No. 72	11/ 5/34
*†Port Huron	License No. 73	7/ 1/34
†Saginaw	License No. 74	7/ 1/34
Minnesota		
* Twin City	Agreement No. 5	9/ 2/33
* Twin City	License No. 5	9/ 2/33

* Resale prices fixed.
† Base-surplus plan adopted.

Analysis of Milk Licenses, Orders and Agreements Promulgated and Approved by the Secretary of Agriculture under the Agricultural Adjustment Act, as amended

—Continued — Page 4

Market	Type of Instrument	Effective Date
Missouri		
*†Kansas City	Amended License No. 40	4/ 1/34
*†Kansas City	Amended License No. 40	5/16/34
†Kansas City	Order No. 13	12/ 1/36
*†St. Louis	Agreement No. 21	11/22/33
*†St. Louis	License No. 18	11/25/33
†St. Louis	License No. 35	3/ 2/34
†St. Louis	Amended License No. 35	6/ 1/34
†St. Louis	Amended License No. 35	8/14/34
St. Louis	Amended License No. 35	11/16/34
St. Louis	Amended License No. 35	3/ 4/35
St. Louis	Order No. 3	2/ 1/36
St. Louis	Amended Order No. 3	4/ 5/39
Nebraska		
* Lincoln	License No. 41	3/17/34
* Lincoln	Amended License No. 41	5/16/34
* Lincoln	Amended License No. 41	8/18/34
* Lincoln	Amended License No. 41	11/16/34
†Lincoln	Amended License No. 41	6/19/35
*†Omaha—Council Bluffs	License No. 33	2/23/34
*†Omaha—Council Bluffs	Amended License No. 33	6/ 1/34
*†Omaha—Council Bluffs	Amended License No. 33	11/16/34
†Omaha—Council Bluffs	Order No. 35	4/ 5/39
New York		
New York	Order No. 27	9/ 1/38
Ohio		
Cincinnati	Order No. 22	5/ 1/38
Cincinnati	Amended Order No. 22	5/13/39
Toledo	Order No. 30	9/16/38
Oklahoma		
* Oklahoma City	License No. 62	6/16/34
* Oklahoma City	Amended License No. 62	9/ 4/34
* Tulsa	License No. 86	8/21/34
*†Tulsa	Amended License No. 86	11/ 5/34
†Tulsa	Amended License No. 86	4/16/35
Pennsylvania		
*†Philadelphia	Agreement No. 3	8/25/33
*†Philadelphia	License No. 3	8/25/33
Rhode Island		
†Newport	Amended License No. 47	4/ 1/34
†Newport	Amended License No. 47	9/ 1/34
†Newport	Amended License No. 47	8/16/35
†Providence	Amended License No. 46	4/ 1/34
†Providence	Amended License No. 46	9/ 1/34
†Providence	Amended License No. 46	10/ 1/34

* Resale prices fixed.
† Base-surplus plan adopted.

Analysis of Milk Licenses, Orders and Agreements Promulgated and Approved by the Secretary of Agriculture under the Agricultural Adjustment Act, as amended

—Continued — Page 5

Market	Type of Instrument	Effective Date
Tennessee		
*†Knoxville	Agreement No. 13	10/ 9/33
*†Knoxville	License No. 10	10/28/33
Texas		
* Fort Worth	License No. 88	9/ 1/34
* Fort Worth	Amended License No. 88	11/ 5/34
†Fort Worth	Amended License No. 88	5/22/35
Virginia		
*†Richmond	Agreement No. 32	12/20/33
*†Richmond	License No. 25	12/20/33
†Richmond	License No. 52	5/ 1/34
†Richmond	Amended License No. 52	4/16/35
Quad Cities Illinois-Iowa		
* Quad Cities	License No. 58	6/ 1/34
*†Quad Cities	Amended License No. 58	9/ 1/34
*†Quad Cities	Amended License No. 58	2/26/35

* Resale prices fixed.
† Base-surplus plan adopted.

APPENDIX B.

Opinions of Cooperative Marketing Experts and Dairy Economists Relating to Uniform Prices and Price Classification Plans for Cooperative Marketing of Milk.

Stability in Milk Markets, U. S. D. A., AAA, Marketing Information Series, DM-3, pp. 8-9.

"Establishment of a price which producers must receive for their product gives recognition to the fact that milk markets are stabilized only when the cost of milk is uniform among all distributors. Uniform buying price for a commodity like milk tends to improve competitive relations in the marketing area. It is a major step toward protection of farmers' milk markets against chaotic and drastically reduced prices and tends generally to maintain milk producers' prices on as high a level as is consistent with prevailing supply and demand conditions."

Uniform Prices to Producers

The Relation of Cooperative Objectives to Agricultural Adjustment Administration Policies—E. W. Gaumnitz, Chief, Dairy Section of Agricultural Adjustment Administration, American Cooperation, 1937, pp. 416 et seq.

"In the case of cooperatives, rarely if ever have they had complete control of the supply of milk in the market. There is always a fairly large group, often in the minority but nevertheless of significance, which does not sell its milk through the cooperative. This minority element frequently is in a position to materially impede the program of the cooperative, regardless of whether the program is sound.

Control of Market by Cooperative

"Viewed in the light of the foregoing, it appears that the limitations to the achievement of the objectives of cooperatives and the policy of the Agricultural Adjustment Administration are largely the same as far as the practical aspects of marketing are concerned, even though the origin of such limitations is different. At the same time,

the marketing methods to be used in the achievement of the objectives are also decidedly similar."

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"Marketing Act Utilizes Same Procedure."

"In this connection, consider the provisions of the Agricultural Adjustment Act relative to the fixing of prices and to prorating to producers the proceeds of sales to distributors. The act (recently amended by the Agricultural Marketing Agreement Act of 1937) provides that the Secretary of Agriculture may enter into marketing agreements and issue orders:

Uniform Prices to Producers

"Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

"The act also provided for the individual-distributor or market-wide pools, with or without rating.

"Thus, not only are the fundamental objectives of the cooperatives and the policy of the Agricultural Adjustment Administration strikingly similar but also the marketing mechanisms which are authorized by the act in effectuation of the declared policy are much the same as the marketing mechanisms which cooperatives have developed during the last two or three decades."

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"Viewed in the light of the foregoing statements, it should be quite readily apparent that the Agricultural Adjustment Act is an effort by the federal government to apply the methods developed and proved sound by cooperatives over the entire market in markets where the federal government has jurisdiction, that is, where a material portion of the milk moves in interstate commerce."

Inter-Association Management of Surplus by Cooperatives for Greater Stability of Market Conditions—T. G. Stitts, Agricultural Economist and Director of Dairy Research of the Farm Credit Administration, American Cooperation, 1937, pp. 457, et seq.

"The cooperative association which bargains for the sale of fluid milk intelligently must study the opportunities available for it to maintain a satisfactory price level to its members and it is generally assumed that a stable market is necessary in order to accomplish this. While the term 'stable market' is a most general expression and there may be quite wide variations as to its exact meaning in any particular market, it is subject to rather definite implications.

"In accordance with the usual interpretations of the term it would appear that four conditions in particular are necessary for a stable market:

Uniform Prices to Producers

1. Uniform buying prices for fluid milk must be maintained in the country; that is, all dealers must pay the same price for milk in the market. Hauling costs, methods of pooling, and base rating plan are all involved in determining the cost of the milk to distributors.

Uniform Prices to Consumer

2. Resale price in the market must be on the same general level. In this connection there may be a spread between wagon delivered prices and store prices, but the general price of all distributors must be on approximately the same level for each class of trade.

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Control of Market by Cooperative

"When more than one association operates in a single market, the competition frequently results in unsatisfactory market conditions, widely fluctuating prices and general unstability for the industry.

"There is no single solution for such conditions, but experience indicates that the cooperative should do all it can to prevent the organization of numerous associations in a single market by the maintenance of a price policy, equitable treatment of all members, and a carefully prepared educational program which will clearly set out the aims, objectives and policies of the cooperative."

The Surplus Problem in the Fluid Milk Market—T. G. Stitts, Agricultural Economist, Director of Dairy Research of the Farm Credit Administration—American Cooperation, 1935, pp. 455, et seq.

"Although there are numerous worthwhile functions that a cooperative can render its members for help to justify its existence and support, fundamentally there is no more competent service than to aid in holding a stable market. In order to do this the bargaining association must take the lead in the development and have accepted by as large a part of the market as possible a workable program for the handling of the entire milk supply of its members."

Control of Market by Cooperative

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"* * * the primary objective of most bargaining cooperatives has been to provide a systematic, practical method for the handling and pricing of all classes of milk and to successfully administer whatever marketing scheme has been adopted. The full attainment of the ideals of the cooperative leads to a desire on the part of the organization for a control over a large proportion of the supply of milk reaching the market. The reason for this is quite obvious. Minorities which have remained outside of the association have frequently been responsible for ruthless competition and a general breakdown of the market. These small minorities have not entered into the general marketing scheme and have not carried their part of the surplus. 'Cheap milk' has been sold on the market because certain producers have not taken part in the general stabilization program."

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"The efforts of the cooperative to attain control of a larger proportion of the market has lead to the belief that the milk association desired a monopoly of supply and expected to exact monopoly prices. It is monopoly only in the sense that the association needs to be in a position to prevent or check uncontrolled supply from developing ruthless competition and disorganization of the market."

Classified Price Plans With and Without Base Set-Ups—Walter Hunnicutt, Regional Milk Marketing Supervisor Agricultural Adjustment Administration, American Cooperation, 1936, pp. 188 et seq.

"The primary purpose of use classification is to sell all of the available milk, and by pooling the proceeds determine the uniform price that shall be paid all producers in a market group for their milk. The necessity for uniform price to producers selling a given market has been repeatedly recognized in both state and federal milk legislation."

Uniform Price to Producers

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"An association pool represents the ideal in that no equalization or auditing is necessary. The association controls and merchandises the milk, collects from the dealer, pools the proceeds, and pays its own outlet sales blended price to its producers. Those markets that can operate on this basis with practically all producers in the association are most fortunate.

"But an association pool does not work well where its control through contract or ownership of the higher priced use outlets falls considerably short of its own supply outlets and of the entire supply and demand. In such cases, a few fluid milk distributors are apt to ignore the set-up and purchase their Class I requirements from independent producers, paying such producers a slightly higher price than the pool price paid by the association.

"This disparity between association pool and independent producer prices tends to discourage association membership and to build up an independent producer group caring nothing for the protection of the market as a whole, but primarily interested in individually securing a higher price than their cooperative association pool neighbors even though it enables their dealer to buy his fluid class requirements for less money. If the independent producer group grows, the exactions on the association pool and the burden of carrying the surplus becomes correspondingly greater and sooner or later it will have to be followed by either market wide pool, individual dealer pool or none at all.

Control of Market by Cooperative

"The only other solution of this problem is for the cooperative association pool to either increase its high use value sales or adjust its production to such sales and thus beat the non-cooperating producers at their own game. But this solution leaves the need for embracing all producers in the market in a common set-up still unsolved and gives too great an opportunity for unethical irresponsible dealers to drive down the price to their producers and use the resulting cheap milk to demoralize the resale market and in consequence the price to all producers."

Uniform Price to Producers

"* * * the primary justification for classified price plans is that *they enable producers to receive the same price for their milk and enable distributors to purchase their milk with each dealer paying the same price for each use. The essential soundness of classified price plans in being fair to producers and fair to distributors and in encouraging a stable market cannot be ignored.* The underlying principles of classified price plans should be better understood, especially by our courts.

"It should be the objective of every cooperative association in the United States to educate their producers and distributors in the principles and methods for successful operation of classified price plans in order that when difficulty arises, the market may be so familiar with these principles and so convinced of their fairness that necessary improvements and adjustments may be made without disturbing the sound progress already achieved and so that the general public and the courts may recognize that classified price plans have long been in use, are fair, and necessary and that they meet with the approval of the great majority of producers and distributors in the particular market."

F. F. Lininger of the Pennsylvania Agricultural Experiment Station, and F. P. Weaver—How to Adjust Milk Production to the Philadelphia Marketing Plan, Circular 123, Pennsylvania State College, pp. 3-4.

Base Surplus Plan

"One of the serious problems for distributors of milk is the handling of the surplus above fluid sales. The total production of a milk shed during the early pasture season, unless artificially regulated, is generally much greater than production during the fall and winter when cows are largely barn-fed.

"Realizing these facts, the 'basic-surplus' plan of selling was adopted in the Philadelphia area in 1919. The object of the plan was to give the farmers an additional incentive to curtail summer production and to increase production during the fall and winter, by paying them a higher price throughout the year for the 'basic' amount of milk than for the surplus above this amount.

"Prior to use of this plan, distributors were compelled frequently to go outside of the milk shed, in the fall, to obtain sufficient milk to supply the fluid demand, while during the spring and early summer there was a large surplus above that required for fluid sales. This surplus had to be devoted to uses in which it netted the distributors a lower return. As a result, this low return generally fixed the price to producers for all milk during the spring and summer. Since the distributors were compelled to maintain channels for the receipt of milk over a large enough area to supply their needs in the fall, the low production in the fall months was responsible for a steady enlargement of the Philadelphia milk shed beyond the size needed throughout the rest of the year. This added to the surplus problem each succeeding spring and summer. The distributors were willing to pay a higher price for the milk which was needed for fluid demand in the summer, if by this plan they could be assured of an adequate supply in the fall. The incentive for the necessary increase in fall production could be provided by paying the producer a price based on returns for milk for fluid uses for only that amount which he produced in the fall, and the incentive for a lessened spring production might come from being compelled to accept the price based on manufactured products for the surplus above this amount."

M. J. B. Ezekial, Special Economic Advisor to Secretary Wallace—Some Economic Aspects of the Marketing of Milk and Cream in New England, U. S. D. A., Circular No. 16, 1927, p. 57.

"The operation of any production-control plan which aims to bring about an even supply of milk throughout the year is likely to fail unless its adoption is general over the larger part of the actual or potential sources of fluid-milk supply.

"The Basic Rating plan of sale and production control probably requires a higher degree of skillful management than does the Use plan. That is, the latter is inherently more self-adjusting and takes care of its own course more easily. Given a highly capable and aggressive management, the Basic Rating plan will secure all the market affords and may result in slightly higher prices to producers than does the Use plan. That is because it tends to prevent dealers from obtaining large surplus quantities of milk and resulting decreased prices to producers."

Base Surplus Plan

Agricultural Adjustment, A Report of Administration of the Agricultural Adjustment Act, May, 1933 to February, 1934, AAA, U. S. D. A., G-8, 1934, pp. 160-161.

"Most of the marketing agreements for the large consuming centers included the so-called 'base-surplus plan' for leveling out production through the year. This system involved an allotment of bases to individual producers designed to insure that each had an opportunity to sell at fluid prices his fair share of the actual fluid sales on the market.

"The base-surplus plan comes into use in a number of fluid-milk markets during and after the World War. It was found that many dairymen produced much more milk in summer than in winter, whereas the demand for fluid milk was nearly uniform throughout the year. Cows usually freshened in the spring, and because they were put on pasture in summer, the cost of producing milk in the summer was much lower than in winter. It was to bring about a closer coordination of supply to demand

Base Surplus Plan

throughout the year, with sufficient milk in the low production season, and to reward the farmer who leveled out his production, that the plan was devised.

"Fluid milk commands a higher price than milk used in other forms. This is because fluid milk must be produced nearby, to meet local health standards, and must be available the year around, including the fall and winter months when production costs are high; whereas butter and other products, which can be stored may be derived from low-cost producing areas and from milk produced in the summer when costs are low.

"Thus the base-surplus plan serves to smooth out the supply over the different seasons of the year, and, as properly administered, is intended to pay the producers approximately in proportion to the use-value of the milk they market. The man who restricts the amount he markets during the summer months approximately to his base is rewarded with a higher average price than that received by the man whose production fluctuates widely between summer and winter. Although effective in reducing seasonal peaks, this system is not in itself regarded as a dependable plan for adjusting production as a whole."

R. W. Bartlett, Professor of Dairy Economy, University of Illinois—St. Louis Milk Problems With Suggested Solutions, University of Illinois Bulletin 412, pp. 130-131.

"The restoration of the basic-surplus plan, which tends to discourage wide seasonal variations in production, coupled with strictly enforced quality requirements, which will keep sporadic producers out of the whole-milk market, should, the author believes, reduce greatly seasonal fluctuations in production in this market and thereby permit it to operate on a more efficient basis."

Base Surplus Plan

APPENDIX C.

Herein excerpts found in the Congressional Record of Floor Debates in the House of Representatives and the Senate during the Sixty-Seventh Congress bearing upon the Capper-Volstead Act, 42 Stat. 388, 7 U. S. C. A., Sections 291, 292.

CONGRESSIONAL RECORD, VOLUME 61, PART I.
House Debates.

(page 1046)

The House Bill (H.R. 2373) as reported out of the House Committee on the Judiciary was passed by the House on May 4, 1921.

(page 1039)

"Mr. J. M. Nelson. The purpose of this act is to relieve the farmers from the possible menace of the Sherman Law in interstate commerce, is it not?

"Mr. Sanders of Indiana. I think so.

"Mr. Nelson. And it leaves it to the arbitrary action of the Secretary of Agriculture.

"Mr. Sanders. In the first place.

"Mr. Nelson. Then what do they gain under this law?

"Mr. Sanders. I doubt if they would gain very much.

"Mr. Lawton. They would gain this, would they not? that if this act is passed they will not be liable to prosecution.

"Mr. Sanders. Yes, that is true.

* * * * * *

"Mr. Mills (after discussing the case of *Connolly* v. *Pipe Line*, 184 U. S.). But this bill goes much further than that. The report says that in so far as the terms of the

act are concerned, aside from the mere act of forming an association, they do not apply. The report says that the bill does not eliminate those provisions of the Sherman anti-trust law. I beg to differ with that report. • • • As I say, it permits one of these associations, if necessary, to combine with another association in violation of the Sherman anti-trust act. It permits one association, if necessary, to make an arrangement with all other existing associations not to sell to a single commission merchant that sells below a certain price. It is possible if it is the intent of the framers of this bill to simply permit the formation of an association or corporation for the purpose of marketing, to say specifically in this bill that the other provisions relating to what these associations shall do after they are formed, shall be subject to the provisions of the Sherman anti-trust act.

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(page 1040)

"Mr. Tincher. I do not think the farmers of this country ask for class legislation but the way the anti-trust laws, so-called, are being administered today amounts to the proposition that the farmer or the organization of farmers that are attempting to promote their business by organizing, are about the only people who are being bothered by that law. I remember two or three years ago when the agitation for this legislation started, the little dairy interests out in the great state of Ohio attempted to organize and collectively sell their products to a distributor which was a legitimate and fair and right thing to do. It should have been permitted under any law; but they were attacked, and not by the great Department of Agriculture even under the administration of Mr. Blanton's friend, Mr. Houston, but they were attacked by individuals and through the Department of Justice and arrested and placed in jail overnight—a lot of them—for

attempting to sell their product under what is known as collective bargaining.

* * * * * *

"Mr. Hill. So, in voting for this bill you vote definitely to repeal the Sherman Act as modified by the act of October 15, 1914, which is known as the Clayton Act. In the second place you definitely authorize the organziation of farmers' corporations for price fixing agreements. It has been said here that farmers could not organize to physically work together but they can organize to fix prices and this bill gives that permission. There is no more reason why you should authorize this in the case of farmers and exempt them from the Sherman and other trust acts than you should in case of bathtub makers or tin-can makers. * * * The provision * * * is dangerous and improper in that it authorizes the Secretary of Agriculture to take the place of the Attorney General in instituting the prosecution of cases. * * *
(page 1041)

"Mr. Sumners. (speaking of agricultural associations) They are willing to yield to the public—that the Secretary of Agriculture, in the first instance, who is the agent of the whole public, if prices received are unreasonable, may issue an order against them, to desist, and then if they do not desist the Secretary of Agriculture may go into the Federal court and procure an injunction. In other words, under that arrangement, the Secretary of Agriculture is to stand as a buffer between these farmers' organizations and prosecutions in the Federal courts and is to stand between these organizations and the public and protect the public.
(page 1042)

"Mr. Sumners. Under this bill it is proposed that the Secretary of Agriculture, representing all the people in this country, presumed to be familiar with the problems

of agriculture, will be able to cooperate with these agricultural associations, helping them to build a greater strength for themselves; at the same time when they put the prices up too high instead of jumping on them and putting their members in jail in the first instance, he will say to them—'The prices are too high, you have got to back up.' And if they do not do so, he will then bring suit in the District Court where the farmers will have the same right to defend as they would have in the event of prosecutions brought in the first place. The judgment, if gotten, will be one of injunction and not for crime. This may not work but the farmers want to try it and the Committee has not been able to devise anything better which will have a chance to pass the Senate and it is doubtful if we can get this by.

* * * * * *

(In response to a question by Mr. Lankford as to whether or not he favored Section 2 of the Act proposed), said Mr. Sumners of Texas. "I favor it because it is necessary to get it through and there must be some sort of public control. The farmers themselves recognize that. * * * It is a choice between giving the Secretary of Agriculture, the Department of Commerce or the Department of Justice original supervision. The farmers prefer the Secretary of Agriculture and I see no reason why the public should object to his designation.

(page 1043)

"Mr. Hersey. Mr. Speaker, this bill exempts farmers co-operative marketing associations from the provisions of the Sherman Anti-trust law and the Clayton Anti-trust act * * *.

(page 1044)

"Mr. Volstead. * * * Section 2 has the entire approval of the farm organizations. * * * It is perfectly evident to any lawyer that it is an advantage to

the farmers to have Section 2 in the bill, not only for the reason expressed by the gentleman from Texas a minute ago but because in the event that there is a complaint against them they will not be subject to criminal prosecution if their organization is permitted by this bill, but an investigation will be had before the Secretary of Agriculture, who is given power to deal with the matter."

CONGRESSIONAL RECORD; VOLUME 62, PART II.

Senate Debates.

The House Bill, (H.R. 2373) as it passed the House of Representatives was called up for consideration before the Senate on January 31, 1922 by Senator Kellogg of Minnesota, Congressional Record, Volume 62, Part 2, p. 1978. Thereafter, at p. 2048 of the same volume, after motion that this bill be considered by the Senate as a Committee of the whole, the same Senator, in speaking in favor of the bill stated:

"As time has passed, it has become necessary for the States and the Congress to adopt modifications in some degree of the antitrust act to permit reasonable aggregations of capital and reasonable cooperation among producers, manufacturers, and traders; and we have, as I shall show, adopted several measures looking toward that end. I believe that one of the most important measures now before the Congress and the country is the one to encourage and reasonably to protect cooperative marketing associations."

Further, at page 2049, after a general discussion of the provisions of the bill, he stated:

"It may be said, therefore, that before such associations can be prosecuted under the Sherman Act for any restraint of trade or monopoly, whether it is a mere technical monopoly or not, the Secretary of Agriculture

must investigate and make a finding that the cooperative association is in restraint of trade or is a monopoly and is unduly enhancing prices."

After discussion of the protection to the public afforded by the bill he was asked by Mr. King:

"It is intended, then, as I understand the Senator, to make all such organizations absolutely immune from criminal prosecution.

"Mr. Kellogg. They are immune from criminal prosecution, and I think they ought to be. I have never known much to be accomplished by criminal prosecution under the Sherman Act; if anything, very little.

"Mr. King. It denies the right of the Attorney General to initiate proceedings, even though he should believe from uncontrovertible evidence that a monopoly stupendous in character and oppressive in results exists by reason of combinations of the character contemplated.

"Mr. Kellogg. The Senator understands from the statement I made that the Attorney General can prosecute suits instituted by the Secretary of Agriculture."

Further, at page 2053, after a further discussion of the various provisions of the bill, Mr. Kellogg, in discussing the proposed Senate amendment striking out Section 2 of the House Bill and adding to Section 1 the following provision:

"Nothing herein contained shall be deemed to authorize the creation of or attempt to trade a monopoly or to exempt any association organized thereunder from any proceedings instituted under the act, entitled, 'An Act to Create a Federal trade commission,' to define its powers and duties and for other purposes, approved September 26, 1914, on account of unfair methods of competition in commerce, said:

"But Mr. President, because there are a few products

of which the committee feel there is danger of monopolization, they propose to hold the sword and the threat of the Sherman Act over all the farming activities of the country, and subject them to unreasonable prosecution and harassments in order to protect the public in a few articles. This bill furnishes ample protection against undue exactions in those articles which it is claimed may be monopolized."

Subsequently, at p. 2058, of the same volume, after further general discussion of the provisions of the bill and the Senate amendment, Senator Capper stated:

"The bill, as it passed the House, and which I hope will have the approval of the Senate, gives to consumers a protection which they do not now have as against middlemen, in that if such farmers' marketing associations unduly enhance prices a complete and adequate remedy is provided in section 2. If such associations unduly enhance prices, the Secretary of Agriculture may order them to cease and desist from monopolizing and restraining trade and commerce."

After further general discussion of the provisions of the bill and the problem which faced agriculture, Senator Fletcher, speaking in favor of the bill at p. 2107 of the same volume stated the following:

"I am cordially in full sympathy with the ideas and the plans which are back of this bill. I do not agree that it is necessary to amend the bill as proposed by the committee in order to avoid the establishment of a monopoly and I think it is advisable to place these associations or organizations outside the provisions of the Sherman anti-trust law."

After extended discussion of the different types of farm legislation in reference to the national farm loan associations and allied credit boards, Senator Walsh of Montana, at p. 2120, speaking in favor of the amendment proposed by

the Senate committee on the Judiciary, caused to be introduced into the record the report of that committee recommending the amendment set forth above. Thereafter, at p. 2122, that Senator spoke as follows:

"I shall be glad to answer the Senator, and that is the course my argument would naturally take.

"Mr. President, this legislation is asked because, it is said, the organization of such associations as those authorized by the bill is fraught with peril of prosecution under the Sherman Act as in violation of its provisions. Bear in mind that no prosecution, so far as the committee was able to ascertain, has ever been instituted under the Sherman Act against any organization of farmers except the proceedings brought against what is known as the California Raisin Growers' Association, of which I shall speak later. I have indicated to the Senate that at the present time vast cooperative associations are actually in operation, the Equity, for instance. Recently there has been organized a great cooperative association known as the National Grain Dealers' Association. The California Fruit Growers' Association has been operating for something like 15 years.

"At no time has any prosecution been instituted against any of these organizations upon the ground that they are violative of the Sherman Act, I take it, because it is the view of those charged with the operation of the law that such combinations as are in existence are not in unreasonable restraint of trade, and that therefore they do not fall under the condemnation of the statute. That seems to have been the judgment of everybody up to this time.

"But it is said that when advocates of the organization of these cooperative farm associations go about for the purpose of inducing farmers thus to cooperate and to associate themselves in cooperation for the purpose of marketing their products, interested parties, those who handle

the business now, the oldline elevator companies in our section of the country, the old commission men dealing in raisins in California, and generally through the country the dealers in milk products, noise it about and circulate a rumor to the effect that organizations of that character are violative of the Sherman Act and prosecutions are likely to be instituted if they are organized. Thus it is said, though I do not know how effectively, that farmers are deterred from associating themselves with these associations by reason of fear of prosecution under the Sherman Act.

"It is my purpose and I think the purpose of most of the members of the committee, at least a majority of the members of the committee, to relieve these people from the peril, if there be peril, of prosecution under the Sherman Act, so far as section 1 is concerned.

"Now, I will answer the question of the Senator from Oregon. The Sherman Act in its important provisions deals with two problems. It penalizes two different things. Section 1 of the Sherman Act forbids any combination, contract, or conspiracy in restraint of trade. Section 2 forbids monopolies and penalizes monopolies wherever they may exist. I read section 1:"

(Section 1 of the Sherman Act read.)

"That is, every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade is punishable by section 1. Section 2 reads as follows:"

(Section 2 of the Sherman Act read.)

"The answer to the Senator from Oregon is that it is our purpose [by the amendment] to relieve these associations from all possible risk of being prosecuted under section 1 of the act, but not under section 2."

After considerable general discussion of the provisions of the bill and the reasons for the Sherman Act, the following question was proposed by Mr. Pomerene:
(page 2160)

"How does the Senator from Montana differentiate between section 2 and section 1 of the Sherman Act. In other words, he wants to preserve the provisions of section 2 with respect to the monopolization of any part of the trade or commerce among the States. The first section, as the Senator knows, declares 'every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade' to be illegal. Is it the Senator's desire to preserve intact the provisions of section 1 of the Sherman law?

"Mr. Walsh of Montana. No; it is my desire to get rid of it so far as farm marketing corporations are concerned. That is the answer I made to the Senator from Oregon (Mr. McNary), who asked me what the Senate Committee bill gives to the farmers that they have not now. It gives them immunity from section 1 of the Sherman Act and does not give them immunity from section 2 of that act.

* * * * * *

"Mr. Walsh of Montana. The Senator puts the question a little too broad for me. I can state my position without the slightest hesitancy or difficulty at all.

"I do not believe that when Congress passed the Sherman antitrust law it had in contemplation at all associations of farmers or farmers assembling themselves together for the purpose of putting their products on the market. I do not recall, and I am sure history affords no evidence of, any grievious wrong ever done to the people of the country by associations or combinations of that kind. I believe that associations of that character stand upon an entirely different footing and that the legislation may be easily classi-

fied so that those associations should be dealt with upon one basis and according to one system of laws, and the ordinary business combination of non-producers, simply dealers in the products, upon an entirely different plane.

* * * * * *

After discussion of section 2 of the Capper-Volstead Act, a further colloquy between Mr. Pomerene and Mr. Walsh occurred:

(page 2161)

"Mr. Pomerene. Mr. President, I am very much interested in the Senator's discussion. A moment ago the Senator said that he sought to relieve agricultural cooperative associations from the provisions of section 1 of the Sherman antitrust law, which declares:

> Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of commerce among the States or with foreign nations is hereby declared to be illegal.

The Senator also is very careful in the substitute bill to preserve intact, as I understand his explanation, the anti-monopoly provisions of section 2 of that act. Having done that as to the provisions of section 1 in reference to restraint of trade, suppose that the association does, in fact, enter into a conspiracy or combination in the form of a trust which does unduly enhance the price of milk—let us say, by way of illustration, that it makes the price of milk 25 cents a quart to the consumer—what remedy would exist if such a condition should prevail?

"Mr. Walsh of Montana. Of course, the Senator from Ohio would have first to give me the facts. It could not possibly be a monopoly, because there is an express provision in the proposed act that it does not authorize the creation of a monopoly. If the absence of monopoly is admitted, then there is competition just exactly as there is now; the matter is regulated by competition. To illustrate

the point, let me take the case of the Raisin Growers' Association, to which I have heretofore referred. That cooperative association undoubtedly has been a great thing for the growers of raisins in the State of California; and I do not undertake to say that it has not been a good thing for the growers of raisins throughout the United States.

"I simply say that a power is placed in the hands of that association which ought to be reposed in no set of men, for at any time they may take advantage of the opportunity they have and exact exorbitant prices.

* * * * * * *

"Mr. Pomerene. When the Senator says he does not want a monopoly in the production of milk he is speaking generally, but I am going to take it for granted that he means monopoly as defined in section 2 of the Sherman Act which prohibits the monopolization of 'any part' of the trade or commerce. I think we understand that; but when it comes to section 1 the Senator says, 'I want to relieve these organizations of any of the restrictions contained in that section,' which declared illegal 'every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade.'

"Assume that there has been organized in the city of Washington an association among the milk producers of Maryland, Virginia, and the District of Columbia, under that organization the Senator desires to permit them to restrain trade. Of course, he means to a reasonable extent; but, if they are permitted to restrain trade, why are they not creating a monopoly of a part of the trade? That is the difficulty which presents itself to my mind.

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(page 2162) –

"Mr. Walsh of Montana. If the Senator from Wisconsin will pardon me for just a moment, I will yield to him in a few moments. If the Senator from Ohio will endeavor

to place the proposition in some concrete form before me I am sure that I can give a very much more satisfactory answer to his question. My idea is to leave the provisions of section 2 of the Sherman Act intact, to make them applicable to associations organized under this bill as well as to all other associations and all other individuals.

* * * * * *

"Mr. Lenroot. But if there be, as a matter of fact, an undue restraint of trade, short of a monopoly, will the Senate substitute prohibit it?

"Mr. Walsh of Montana. The Senate substitute will not prohibit it, and neither will the House bill, as I shall show presently. My contention about the matter is, though, that there will be no undue enhancement if we eliminate the monopoly feature, because competition will take care of it then, just as it does now.

* * * * * *

"Mr. Lenroot. * * * I understand the Senator's position, then, to be that if there be a partial restraint of trade, short of monopoly, and undue enhancement of prices results, such restraint is held to be legal, and there is no remedy, while the House bill permits not only partial restraint of trade but complete monopoly, but if there be undue enhancement of price in either case it is regulated, first, by the Secretary of Agriculture, and secondly, by the courts. Am I correct?

"Mr. Walsh of Montana. In a certain way the Senator is correct; but I propose to discuss the whole subject of section 2 and give you my views to the effect that the House provision is entirely unnecessary, in the first place, and is entirely nugatory, in the second place.

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"Mr. Walsh of Montana. * * * I trust the Senator from Florida, whose mind is always clear upon these matters,

will address it to the case that I have supposed. The secretary finds that all of these people are in the association, that it constitutes a monopoly, and that it charges 16 cents a quart for milk, which is an unreasonable price. What kind of an order under those circumstances does the Secretary make? There is no use talking about proceedings in court and about the Attorney General, and that kind of thing, because the court does not come into action until after the Secretary makes his order. We want to know what the Secretary can do. The court can revise or modify that order.

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"Mr. Norris. In answer to the Senator's proposition as to what kind of order the Secretary could make, I wish to make this suggestion: In the case the Senator has used as an illustration the Secretary finds that the association is a monopoly and that it has unduly enhanced the price of milk. Would it not be perfectly proper and reasonable and legal for the Secretary to say that he finds, first, that it is a monopoly, which it is necessary to find, and then that it has unduly enhanced the price of milk from 10 cents, which is a reasonable price, to 16 cents, which is an unreasonable price? Would it not have the effect at least of putting the association on notice that it never would get by the Secretary until it reduced it down to the price he had fixed?

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"Mr. Norris. The Senator suggests that they would desist from 16 cents and come back with a price of 15½ cents, but if the Secretary had already told them in his first order what he regarded as a reasonable price, even assuming that he has no more power than the Senator says he has, it seems to me the association would only take upon themselves a lot of unnecessary litigation and trouble, because they would know they would eventually be refused and the

price set aside until they got down to the price the Secretary had fixed.

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"Mr. Pomerene. I would like to ask the Senator another question. The Senator has been discussing the price regulation features of the House bill. Of course, I think we must all concede that it is possible to charge the consumer excessive prices under either the House bill or the bill as reported from the Senate committee. Assume, for the sake of the argument, that these associations are organized and that excessive prices are charged to the consumer, what remedy is there?

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"Mr. Cummins. I have been prompted for some minutes to ask the Senator from Montana with regard to the duty imposed upon the Secretary to ascertain, and then determine officially whether or not the price of any agricultural product has been unduly advanced, I assume, by reason of the monopoly or by reason of the restraint of trade. What rule known to the law or prescribed in the statutes would be applied by the Secretary of Agriculture in determining whether or not the price has been unduly advanced?

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"Mr. Walsh of Montana. No; not if it does not amount to a monopoly. In other words, if the Senator will pardon me, I want to leave that just exactly as it is now. A suit can not be brought now unless it is brought under the Sherman Act.

"Mr. Kellogg. I do not agree with the Senator; but under the Senator's substitute a suit would have to be brought under the Sherman Act if there was a monopoly. Is not that true?

"Mr. Walsh of Montana. Yes; that is true.

"Mr. Kellogg. Very well. Under the House bill, if a

suit is brought by the Secretary of Agriculture he can invoke every remedy that the Sherman Act provides for; can he not?

"Mr. Walsh of Montana. I do not think so.

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"Mr. Walsh of Montana. I will say to the Senator with perfect frankness that it was my idea that this bill, being later than the Sherman Act, and authorizing these associations, and authorizing them to make the contracts necessary, operated of necessity, *pro tanto*, as a repeal of the Sherman Act. That was my theory about it, but I must confess that I have such deference to the opinion of Mr. Thorne with respect to matters of this kind that I am somewhat disturbed in my view about it.

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"Mr. Cummins. * * * The Senator from Minnesota suggested, as I recall his observation, that after the Secretary of Agriculture acted under section 3, the Sherman law would be in full force as to that corporation or association. I do not quite understand that. If I correctly interpret the decisions, as well as the law itself, restraint of trade is unlawful, no matter whether it increases or decreases prices. Monopoly is unlawful, no matter whether its effect may be to increase or to decrease prices. Does the Senator from Minnesota mean to say that the Sherman law, then, could be applied in its full force to a corporation condemned by the Secretary of Agriculture?

"Mr. Kellogg. No; I did not say so. I said that if the Secretary of Agriculture found that the restraint of trade and the monopoly had gone to such an extent that the price of agricultural products was unduly enhanced, he could make an order against the restraint of trade and the monopoly, and if he brought a suit to enforce that, the court could apply any remedy against that particular monopoly

and restraint of trade that it could now apply under the Sherman Act—that is, in the same form. To make that perfectly clear, the Senator from Kansas (Mr. Capper) offered an amendment, on page 3, line 13, of the bill, to insert, after the word 'order', the following:

> Or enter such other decree as the court may deem equitable."

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"Mr. Walsh of Montana. * * * In an article which he (the present Chief Justice of the Supreme Court) contributed to one of the law magazines some time ago he called attention to the fact that the case of Connolly against Union Sewer Pipe Co. arose under a State statute, and that the decision was put upon the ground that the statute had violated the 'equal protection of the laws' clause of the fourteenth amendment to the Constitution. However, he said in that connection that if Congress should pass such an act as that enacted by the Legislature of Illinois doubtless other provisions of the Constitution would be found under which it would likewise be condemned. So the present Chief Justice, at least, is rather committed in that way.

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"Mr. Brandegee. * * * We are asked to pass a statute which, except for the prohibition of an actual monopoly, would allow all the people included in the classes to which I have referred to make any sort of contracts they want to make, without any authority on the part of the Government to question them.

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"What purposes? The necessary contracts and agreements for 'collectively handling and marketing in interstate and foreign commerce such products of the persons so engaged,' and so forth. They may make such con-

tracts as are necessary to produce, process, get into the market, and effectively sell such products, but the Sherman law says that 'every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.' That is where this bill takes these associations out of the Sherman antitrust act.

* * * * * *

"Mr. Pomerene. Does the Senator construe the provision of the bill to which he has just referred, namely, that they can make such contracts as they see fit, to be broad enough to authorize them to make any contracts they see fit, for instance, with Swift & Co. or with any large milling company, with regard to the marketing of their products?

"Mr. Brandegee. They can make contracts with anybody or with any corporation.

"Mr. Pomerene. And fixing the prices at anything they see fit?

"Mr. Brandegee. Yes; under that they can make contracts with each other that they would not offer for sale a pound of cotton or a piece of tobacco or a bushel of wheat or a beef steer in the country; an agreement with each other that they would raise them and hold them all back until they got word, from the central office as to the price at which the members should be allowed to sell. If anybody else does it, it is a crime, and he would be put in State prison for it.

"As I said, it puts in the control of these interlocking associations of men, who raise and handle everything that comes from the soil, every article of food and every constituent that goes into the making of clothing. It gives them, if they have a mind to exercise it, a stranglehold upon the whole United States to hold up prices, to agree

to withhold their crops from the market until a stipulated price is reached, and to make every sort of contract that has been hitherto considered against the public interest and made a crime, which was made a crime in 1890, and has been so considered for 32 years, by common consent.

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"Mr. Townsend. * * * The House bill proposes that farmers may organize—I think they can do it under the law now—for the purpose of controlling markets in the sense of taking advantage of the best market possible, consistent with the good of the country. Threats of prosecutions, however, hinder them from organizing. The House bill proposes to permit proper organization. The proponents of the amendment say that they have no objection to eliminating the possibility of section 1 of the Sherman antitrust law applying to agricultural organizations, but they lay especial emphasis on their claim that section 2 must apply to these organizations. Why, sir, if this amendment is agreed to, then I submit that the Congress has specifically stated that even though the original intention of the makers of the Sherman antitrust law was not to cover farmers' organizations, it shall cover those organizations henceforth from the passage of this bill. It would be better to defeat the measure than pass it with this amendment.

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"Mr. King. As I read the House bill before us, the question of monopoly is not a matter of consideration at all by the Secretary of Agriculture. There may be a monopoly, but he may not invoke his power or use his power for the purpose of suppressing it or issuing any order with respect to the monopoly. He can only act if he conceives that there is an undue enhancement of price. Of

course, I presume the Senator will reply there can not be an undue enhancement of price unless there is a monopoly. There may be something in the argument, but I call the Senator's attention to the fact that the Secretary of Agriculture may not act at all because there is a monopoly.

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"Mr. Lenroot. Does the Senator from Montana disagree with that? This is an affirmative piece of legislation.

"Mr. Walsh of Montana. I have never heard such a proposition as that asserted before. If the Sherman Act was a valid constitutional enactment at the time it was enacted, it could not become unconstitutional by reason of an amendment to it.

"Mr. Lenroot. Certainly Congress has power—I do not think the Senator will disagree with me upon that—to provide a different method of dealing with combinations than has heretofore been provided by Congress, even if it does not in subsequent legislation cover all combinations but does cover some.

"Mr. Walsh of Montana. I have no doubt that Congress may expressly or impliedly repeal the Sherman law.

"Mr. Lenroot. Certainly.

"Mr. Walsh. But I can not follow the Senator from Wisconsin when he says that by a subsequent act of Congress the Sherman law may be held to be unconstitutional.

"Mr. Lenroot. Let me answer the Senator. Supposing Congress enacts subsequent legislation, which it has the power to enact, for, without question, if there had never been a Sherman law passed, the legislation it enacted would be perfectly proper; but, by reason of the existence of the Sherman law, we have attempted to deal in one

way with a certain class of people and in a different way with another class of people; and it should be held that, while in dealing with one class of people we must deal with all alike, or, although there is an evil which the Sherman law was intended to cover and to remedy, we may remove a part of that class from the Sherman law just the same as if we had made an exception to the Sherman law in this instance, which was exactly what was held in the Connolly case.

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"Mr. Lenroot. If the Senator will permit me, it was urged in the Connolly case that although the exception of growers of agricultural products was unconstitutional, nevertheless the remainder of the act could stand; but the court said, 'No; the legislature of the State of Illinois has decreed that growers of agricultural products should not be subject to the law; therefore we can not read them into it; and inasmuch as the first section provides that all persons shall be subject to the law, and yet the legislature specifically said that the growers of agricultural products shall not be, therefore the whole law is invalid.'

"Mr. Walsh of Montana. I do not desire to follow the argument of the Senator or to attempt to refute it. I merely state my own position with respect to the matter. If the legislature of the State of Illinois had passed its antitrust act without the offensive clause in it and had enacted the offensive clause at a subsequent session, the original law, in my judgment, would stand unimpaired and the qualifying clause would be held unconstitutional. It would be held unconstitutional upon the ground that it was equivalent to the reenactment of the original act with the qualifying clause. That would be the law which would be declared to be unconstitutional and not the other law, which would remain unimpaired. So here the

Sherman Act exists; it is the law. If we pass this bill we pass a law which practically says, 'The Sherman Act is hereby reenacted subject to the following conditions, however.' Then the question would be presented as to the legality and constitutionality not of the original act but of the subsequent act, and that being held unconstitutional, the original act would remain in all of its force and effect.

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"Mr. Walsh of Montana. * * * I wish it to be thoroughly understood, as we proceed to vote, that to reject the Senate substitute and to adopt the House text will be to remove the inhibition from setting up any milk monopoly in any one of the great cities of the country, and with no check upon anything they may do in the way of exacting exorbitant prices from consumers, except as it is provided in section 3 of the bill, the validity of which is open to most serious question, as pointed out in the very persuasive and informing discussion by the Senator from Iowa (Mr. Cummins), which no one has attempted to answer at all, and as to the significance and operation of which even the proponents of the bill differ.

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(page 2282)

House Bill (H.R. 2373) was passed by the Senate February 8, 1922, with minor amendments, restricting the language of the Bill to interstate commerce and providing for rules and regulations by the Secretary of Agriculture for the taking of evidence and expanding decrees of the District Court to include any arrangement the Court might deem equitable. On February 11, 1922 the House concurred in the Senate amendments, pages 2453 to 2455.

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SUPREME COURT OF THE UNITED STATES.

No. 397.—October Term, 1939.

The United States of America, Appellant, *vs.* The Borden Company, Charles L. Dressel, Harry M. Reser, et al.	Appeal from the District Court of the United States for the Northern District of Illinois.

[December 4, 1939.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The Government appeals from a judgment of the District Court sustaining demurrers and dismissing an indictment charging combination and conspiracy in violation of Section one of the Sherman Anti-Trust Act. 28 F. Supp. 177.

The trade and commerce alleged to be involved is the transportation to the Chicago market of fluid milk produced on dairy farms in Illinois, Indiana, Michigan and Wisconsin and the distribution of the milk in that market. The Government divides the defendants into five groups,—(1) distributors and allied groups which include a number of corporations described as major distributors and their officers and agents, the Associated Milk Dealers, Inc., a trade association of milk distributors, and its officers and agents, and the Milk Dealers Bottle Exchange, a corporation controlled by the major distributors; (2) the Pure Milk Association, a cooperative association of milk producers incorporated in Illinois, and its officers and agents; (3) the Milk Wagon Drivers Union, Local 753, engaged in the distribution of milk in Chicago, and certain labor officials; (4) municipal officials, including the president of the Board of Health of Chicago and certain subordinate officials; (5) two persons who arbitrated a dispute between the major distributors and the Pure Milk Association, fixing the price of milk to be paid to the members of the association.

The indictment, which was filed in November, 1938, contains four counts. The several defendants challenged it by demurrers and motions to quash on various grounds. The District Court held with respect to counts one, two and four, that the production and mar-

keting of agricultural products, including milk, are removed from the purview of the Sherman Act by the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246); also with respect to all four counts, according to the formal terms of its judgment, that the Pure Milk Association, as an agricultural cooperative association, its officers and agents, are exempt from prosecution under Section one of the Sherman Act by Section 6 of the Clayton Act (15 U. S. C. 17), Sections one and two of the Capper-Volstead Act (7 U. S. C. 291, 292), and the Agricultural Marketing Agreement Act. With respect to count three, the District Court held that it was duplicitous, in the view that it charged several separate conspiracies and also that it did not definitely charge a restraint of interstate commerce.

The judgment expressly overruled the demurrers and motions to quash so far as they challenged the constitutionality of the Sherman Act or the sufficiency of the allegations of unlawful conspiracy, and also so far as it was contended that interstate commerce was not involved in counts one, two and four. The court added that it overruled all the defendants' contentions which it had not specifically overruled or sustained. The judgment ends by dismissing the indictment as to all defendants.

The first question presented concerns our jurisdiction. The exceptional right of appeal given to the Government by the Criminal Appeals Act is strictly limited to the instances specified.[1] The provision invoked here is the one which permits review where a decision quashing or sustaining a demurrer to an indictment or any of its counts is based upon the "construction of the statute upon which the indictment is founded". The decision below was not predicated upon invalidity of the statute.

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[1] This Act (18 Stat. 682; Jud. Code, Sec. 238, 28 U. S. C. 345) provides:

"An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in criminal cases, in the following instances, to wit:

"From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded.

"From a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded.

"From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy. . . .

"Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be admitted to bail on his own recognizance: *Provided*, That no appeal shall be taken by or allowed the United States in any case where there has been a verdict in favor of the defendant".

The established principles governing our review are these: (1) Appeal does not lie from a judgment which rests on the mere deficiencies of the indictment as a pleading, as distinguished from a construction of the statute which underlies the indictment. (2) Nor will an appeal lie in a case where the District Court has considered the construction of the statute but has also rested its decision upon the independent ground of a defect in pleading which is not subject to our examination. In that case we cannot disturb the judgment and the question of construction becomes abstract. (3) This Court must accept the construction given to the indictment by the District Court as that is a matter we are not authorized to review. (4) When the District Court holds that the indictment, not merely because of some deficiency in pleading but with respect to the substance of the charge, does not allege a violation of the statute upon which the indictment is founded, that is necessarily a construction of that statute. (5) When the District Court has rested its decision upon the construction of the underlying statute this Court is not at liberty to go beyond the question of the correctness of that construction and consider other objections to the indictment. The Government's appeal does not open the whole case.

First. The first two of these principles, as the Government concedes, preclude our review of the decision below as to count three. For that count was held bad upon the independent ground that it is defective as a pleading, being duplicitous and also lacking in definiteness. *United States* v. *Keitel*, 211 U. S. 397-399; *United States* v. *Carter*, 231 U. S. 492, 493; *United States* v. *Hastings*, 296 U. S. 188, 192-194. The appeal as to count three must be dismissed.

Second. After a general description of the averments of the indictment, which was explicitly founded on Section one of the Sherman Act, the District Court construed counts one, two and four as follows:

"Count 1 charges a conspiracy 'to arbitrarily fix, maintain and control artificial and non-competitive prices to be paid to all producers by all distributors for all fluid milk produced on approved dairy farms located in the states of Illinois, Indiana, Michigan and Wisconsin', and shipped to Chicago".

"Count 2 charges a conspiracy 'to fix and maintain by common and concerted action, uniform, arbitrary and non-competitive prices for the sale by the distributors in the city of Chicago of fluid milk shipped into the said city from the states of Illinois, Indiana, Michigan and Wisconsin' ".

"Count 4 charges a conspiracy 'to restrict, limit and control and to restrain and obstruct the supply of fluid milk moving in the channels of interstate commerce into the city of Chicago from the states of Illinois, Indiana, Michigan and Wisconsin' ".

The District Court further summarized the allegations in these counts as to the methods by which the alleged conspiracies were intended to be effected. 28 F. Supp. pp. 179-181. This construction of the indictment is binding upon this Court on this appeal. *United States* v. *Patten*, 226 U. S. 525, 535, 540; *United States* v. *Colgate*, 250 U. S. 300, 301; *United States* v. *Schrader's Son*, 252 U. S. 85, 98; *United States* v. *Yuginovich*, 256 U. S. 450, 461; *United States* v. *Hastings, supra*, p. 192.

Third. The District Court, thus construing counts one, two and four, held as a matter of substance that, because of the effect of the later statutes, these counts did not charge an offense under Section one of the Sherman Act. This was necessarily a construction of the Sherman Act. *United States* v. *Patten, supra*; *United States* v. *Birdsall*, 233 U. S. 223, 230; *United States* v. *Kapp*, 302 U. S. 214, 217. We are not impressed with the argument that the court simply construed the later statutes. The effect of those statutes was considered in determining whether the Sherman Act has been so modified and limited that it no longer applies to such combinations and conspiracies as are charged in counts one, two and four. Thus the Sherman Act was not the less construed because it was construed in the light of the subsequent legislation.

We have jurisdiction under the Criminal Appeals Act to determine whether the construction thus placed upon the Sherman Act is correct.

Fourth. In reaching its conclusion, the District Court referred to Section 6 of the Clayton Act, Sections 1 and 2 of the Capper-Volstead Act, and the Agricultural Adjustment Act of 1933, as amended in 1935, and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937.

With respect to the Clayton Act,[2] the court said in its opinion: "By that act labor, agricultural or horticultural cooperative organizations were excepted from the broad and sweeping terms of the

[2] Section 6 of the Clayton Act (38 Stat. 730, 15 U. S. C. 17) provides:

"The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or con-

Sherman Act. Such cooperative organizations, in and of themselves, were not to be construed as illegal combinations or conspiracies in restraint of trade under the anti-trust laws". 28 F. Supp. 183. But the court did not hold that, by these provisions of the Clayton Act, either the defendants Pure Milk Association and its officers and agents or the defendants Milk Wagon Drivers Union, Local 753, and its officials, (albeit these organizations were not in themselves illegal combinations or conspiracies) were rendered immune from prosecution under the Sherman Act for their alleged participation in the combinations and conspiracies charged in counts one, two and four of the indictment. The Sherman Act was not construed by the District Court as having been limited to that extent by the Clayton Act.

The court invoked the Capper-Volstead Act,[3] as its judgment shows, only in relation to certain defendants, that is, the Pure Milk Association, an agricultural cooperative organization, and its officers and agents. We shall consider later the effect of that statute upon the charge against those defendants.

The court dismissed the indictment as to *all* defendants, and we think it manifest that this ruling in its bearing upon counts one, two and four was due to the effect upon the Sherman Act which the court attributed to the Agricultural Marketing Agreement Act.[4]

(1). As to that Act, the court said:

"The Court holds that, by the Agricultural Marketing Agreement Act the Congress has committed to the Executive Department, acting through the Secretary of Agriculture, full, complete, and plenary power over the production and marketing, in interstate commerce, of agricultural products, including milk.

"To what extent he should act, the quantum of regulation is solely one for his judgment and decision. If conditions require, he must act; if they do not require action, then all marketing conditions are deemed satisfactory and the purpose of the act is effectuated. Non-action by the Secretary of Agriculture, in any given marketing area, is equivalent to a declaration that the policy

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ducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws".

[3] 42 Stat. 388, 7 U. S. C. 291, 292.

[4] The District Court referred, in passing, to the Cooperative Marketing Act of July 2, 1926 (44 Stat. 803, 7 U. S. C. 455), and to the provisions of the Agricultural Adjustment Act of 1933 (48 Stat. 31), as amended in 1935 (49 Stat. 750), which was followed by the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246).

of the act, in that area, is being carried out. If the policy of the act, in any given milk area, is being violated it becomes the duty of the Secretary of Agriculture to intervene and invoke the powers conferred upon him by the act.

"It results, from what has been said, that the power of regulation, supervision and control of the milk industry, in any given milk shed, is, by the Agricultural Marketing Agreement Act of 1937, vested exclusively in the Secretary of Agriculture. It follows further that the Secretary of Agriculture cannot by his own action, or inaction, divest himself of this power so long as the statute remains in force. The marketing of the agricultural products, including milk, covered by the Agricultural Marketing Agreement Act, is removed from the purview of the Sherman Act. In other words, so far as the marketing of agricultural commodities, including milk, is concerned, no indictment will lie under section 1 of the Sherman Act". 28 F. Supp. p. 187.

It will be observed that the District Court attributes this effect to the Agricultural Marketing Agreement Act *per se*, that is, to its operation in the absence, and without regard to the scope and particular effect, of any marketing agreements made by the Secretary of Agriculture or of any orders issued by him pursuant to the Act. In the opinion of the court below, the existence of the authority vested in the Secretary of Agriculture, although unexercised, wholly destroys the operation of Section 1 of the Sherman Act with respect to the marketing of agricultural commodities.

We are of the opinion that this conclusion is erroneous. No provision of that purport appears in the Agricultural Act. While effect is expressly given, as we shall see, to agreements and orders which may validly be made by the Secretary of Agriculture, there is no suggestion that in their absence, and apart from such qualified authorization and such requirements as they contain, the commerce in agricultural commodities is stripped of the safeguards set up by the Anti-Trust Act and is left open to the restraints, however unreasonable, which conspiring producers, distributors and their allies may see fit to impose. We are unable to find that such a grant of immunity by virtue of the inaction, or limited action, of the Secretary has any place in the statutory plan. We cannot believe that Congress intended to create "so great a breach in historic remedies and sanctions".[5]

It is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same sub-

[5] See General Motors Corporation v. United States, 286 U. S. 49, 61.

ject, the rule is to give effect to both if possible. *United States* v. *Tynen*, 11 Wall. 88, 92; *Henderson's Tobacco*, 11 Wall. 652, 657; *General Motors Corporation* v. *United States*, 286 U. S. 49, 61, 62. The intention of the legislature to repeal "must be clear and manifest". *Red Rock* v. *Henry*, 106 U. S. 596, 601, 602. It is not sufficient, as was said by Mr. Justice Story in *Wood* v. *United States*, 16 Pet. 342, 362, 363, "to establish that subsequent laws cover some or even all of the cases provided for by [the prior act]; for they may be merely affirmative, or cumulative, or auxiliary". There must be "a positive repugnancy between the provisions of the new law, and those of the old; and even then the old law is repealed by implication only *pro tanto* to the extent of the repugnancy". See, also, *Posadas* v. *National City Bank*, 296 U. S. 497, 504.

The Sherman Act is a broad enactment prohibiting unreasonable restraints upon interstate commerce, and monopolization or attempts to monopolize, with penal sanctions. The Agricultural Act is a limited statute with specific reference to particular transactions which may be regulated by official action in a prescrribed manner. The Agricultural Act[6] declares it to be the policy of Congress "through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural communities in the base period" described. To carry out that policy a particular plan is set forth. Farmers and others are not permitted to resort to their own devices and to make any agreements or arrangements they desire, regardless of the restraints which may be inflicted upon commerce. The statutory program to be followed under the Agricultural Act requires the participation of the Secretary of Agriculture who is to hold hearings and make findings. The obvious intention is to provide for what may be found to be reasonable arrangements in particular instances and in the light of the circumstances disclosed. The methods which the Agricultural Act permits to attain that result are twofold, marketing agreements and orders. To give validity to marketing agreements the Secretary must be an actual party to

[6] 7 U. S. C. Supp. IV, 602(1).

the agreements. Section 8b.[7] The orders are also to be made by the Secretary for the purpose of regulating the handling of the agricultural commodity to which the particular order relates. Section 8c(3)(4).[8] That the field covered by the Agricultural Act is not coterminus with that covered by the Sherman Act is manifest from the fact that the former is thus delimited by the prescribed action participated in and directed by an officer of government proceeding under the authority specifically conferred by Congress. As to agreements and arrangements not thus agreed upon or directed by the Secretary, the Agricultural Act in no way impinges upon the prohibitions and penalties of the Sherman Act, and its condemnation of private action in entering into combinations and conspiracies which impose the prohibited restraint upon interstate commerce remains untouched.

It is not necessary to labor the point, for the Agricultural Act itself expressly defines the extent to which its provisions make the antitrust laws inapplicable. That definition is found in Section 8(b)[9] of the Agricultural Adjustment Act carried into the Agricultural Marketing Agreement Act in relation to marketing agreements, and provides as follows:

"In order to effectuate the declared policy of this chapter, the Secretary of Agriculture shall have the power, after due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof, only with respect to such handling as is in the current of interstate or foreign commerce or which directly burdens, obstructs, or affects interstate or foreign commerce in such commodity or product thereof. The making of any such agreement shall not be held to be in violation of any of the antitrust laws of the United States, and any such agreement shall be deemed to be lawful: *Provided*, That no such agreement shall remain in force after the termination of this chapter".

Another provision is found in Section 3(d)[10] of the Agricultural Marketing Agreement Act, relating to awards or agreements resulting from the arbitration or mediation by the Secretary of Agriculture or by a designated officer or employee of the Department of

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[7] 7 U. S. C. Supp. IV, Sec. 608b.
[8] 7 U. S. C. Supp. IV, Sec. 608c(3)(4).
[9] 7 U. S. C. Supp. IV, Sec. 608b.
[10] 50 Stat. 249.

Agriculture as provided in Section 3(a),[11] and meetings for that purpose and awards or agreements resulting therefrom which have been approved by the Secretary of Agriculture as provided in Section 3(b).[12] Section 3(d) provides:

"No meeting so held and no award or agreement so approved shall be deemed to be in violation of any of the antitrust laws of the United States".

These explicit provisions requiring official participation and authorizations show beyond question how far Congress intended that the Agricultural Act should operate to render the Sherman Act inapplicable.[13] If Congress had desired to grant any further immunity, Congress doubtless would have said so.

An agreement made with the Secretary as a party, or an order made by him, or an arbitration award or agreement approved by him, pursuant to the authority conferred by the Agricultural Act and within the terms of the described immunity, would of course be a defense to a prosecution under the Sherman Act to the extent that the prosecution sought to penalize what was thus validly agreed upon or directed by the Secretary. Further than that the Agricultural Act does not go.

We have no occasion to decide whether in any particular case an indictment under the Sherman Act by reason of its particular terms would be subject to demurrer, or to a motion to quash, upon the ground that the indictment ran against the provisions of such an agreement or order. We have no such situation here. There is indeed a contention that there was a license (No. 30) issued by the Secretary of Agriculture in 1934, amended in January, 1935, and in force until March 2, 1935, which related to the marketing of milk in the Chicago area, and hence that defendants operating under that license were not subject to the charges of the conspiracies alleged to have begun in January, 1935. But the allegations of the indictment are that the unlawful conspiracies continued throughout all the period mentioned in the indictment, that is, up to the time of its presentment in November, 1938. This clearly imports that the conspiracies were operative after the license came to an end and thus in the absence of any license. A conspiracy thus continued is in effect renewed during each day of its continuance. *United*

11 50 Stat. 248.

12 50 Stat. 248.

13 See 77 Cong. Rec., Pt. II, p. 1977; Pt. III, p. 3117.

States v. *Kissel*, 218 U. S. 601, 607, 608; *Hyde* v. *United States*, 225 U. S. 347, 369; *Brown* v. *Elliott*, 225 U. S. 392, 400. It is also said that there is a recent marketing order under date of August 29, 1939,[14] which relates to the Chicago marketing area, and hence that this cause is moot. But that order affects a period subsequent to the time covered by the indictment. These contentions are unavailing in relation to the question before us.

Our conclusion is that the Agricultural Adjustment Act as reenacted and amended by the Agricultural Marketing Agreement Act affords no ground for construing the Sherman Act as inapplicable to the charges contained in counts one, two and four.

(2). There remains the question whether the court below rightly held that the Capper-Volstead Act[15] had modified the Sherman Act so as to exempt the Pure Milk Association, a cooperative agricultural organization, and its officers and agents, from prosecution under these counts.

As to the Capper-Volstead Act the Court said:

"This Act legalizes price fixing for those within its purview. To that extent it modifies the Sherman Act. It removes from the Sherman Act those organizations, cooperative in their nature, which come within the purview of the Capper-Volstead Act. Prior to the Capper-Volstead Act farmers were treated no differently than others under the antitrust laws, so far as price fixing was concerned.

. . .

"The Capper-Volstead Act does not condemn any kind of monopoly or restraint of trade, or any price fixing, unless such monopoly or price fixing unduly enhances the price of an agricultural product. The Act then, by section 2 thereof, commits to an officer of the executive department, the Secretary of Agriculture, the power of regulation and visitation.

"Under this act farmers are favored under the antitrust laws in that they are given a qualified right, free from any criminal liability, to combine among themselves to monopolize and restrain interstate trade and commerce in farm products and to fix and enhance the price thereof.

" . . . The court deduces from the Capper-Volstead Act that the Secretary of Agriculture has exclusive jurisdiction to determine and order, in the first instance, whether or not farmer cooperatives, in their operation, monopolize and restrain interstate trade and commerce 'to such an extent that the price of any agri-

[14] Federal Register, August 30, 1939, Order No. 41, Vol. 4, pp. 3764-3768, 3770.

[15] 42 Stat. 388, 7 U. S. C. 291, 292.

cultural product is unduly enhanced'. Until the Secretary of Agriculture acts, the judicial power cannot be invoked''. 28 Supp., pp. 183, 184.

We are unable to accept that view. We cannot find in the Capper-Volstead Act, any more than in the Agricultural Act, an intention to declare immunity for the combinations and conspiracies charged in the present indictment. Section 6 of the Clayton Act, enacted in 1914,[16] had authorized the formation and operation of agricultural organizations provided they did not have capital stock or were conducted for profit, and it was there provided that the antitrust laws should not be construed to forbid members of such organizations ''from lawfully carrying out the legitimate objects thereof''. They were not to be held illegal combinations. The Capper-Volstead Act, enacted in 1922,[17] was made applicable as well to cooperatives having capital stock. The persons to whom the Capper-Volstead Act applies are defined in Section one as producers of agricultural products, ''as farmers, planters, ranchmen, dairymen, nut or fruit growers''. They are authorized to act together ''in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce'' their products. They may have ''marketing agencies in common'', and they may make ''the necessary contracts and agreements to effect such purposes''.

The right of these agricultural producers thus to unite in preparing for market and in marketing their products, and to make the contracts which are necessary for that collaboration, cannot be deemed to authorize any combination or conspiracy with other persons in restraint of trade that these producers may see fit to devise. In this instance, the conspiracy charged is not that of merely forming a collective association of producers to market their products but a conspiracy, or conspiracies, with major distributors and their allied groups, with labor officials, municipal officials, and others, in order to maintain artificial and non-competitive prices to be paid to all producers for all fluid milk produced in Illinois and neighboring States and marketed in the Chicago area, and thus in effect, as the indictment is construed by the court below, ''to compel independent distributors to exact a like price from their customers'' and also to control ''the supply of fluid milk per-

[16] 38 Stat. 731.

[17] 42 Stat. 388.

mitted to be brought to Chicago". 28 F. Supp. 180-182. Such a combined attempt of all the defendants, producers, distributors and their allies, to control the market finds no justification in Section one of the Capper-Volstead Act.

Nor does the court below derive its limitation of the Sherman Act from Section one. The pith of the court's conclusion is that under Section two an exclusive jurisdiction with respect to the described cooperative associations is vested, in the first instance, in the Secretary of Agriculture, and that, until the Secretary acts, the judicial power to entertain a prosecution under the Sherman Act cannot be invoked. Section two of the Capper-Volstead Act does provide a special procedure in a case where the Secretary of Agriculture has reason to believe that any such association "monopolizes" or restrains interstate trade "to such an extent that the price of any agricultural product is unduly enhanced". Thereupon the Secretary is to serve upon the association a complaint, stating his charge with notice of hearing. And if upon such hearing the Secretary is of the opinion that the association "monopolizes", or does restrain interstate trade to the extent above mentioned, he then is to issue an order directing the association "to cease and desist" therefrom. Provision is made for judicial review.

We find no ground for saying that this limited procedure is a substitute for the provisions of the Sherman Act, or has the result of permitting the sort of combinations and conspiracies here charged unless or until the Secretary of Agriculture takes action. That this provision of the Capper-Volstead Act does not cover the entire field of the Sherman Act is sufficiently clear. The Sherman Act authorizes criminal prosecutions and penalties. The Capper-Volstead Act provides only for a civil proceeding. The Sherman Act hits at attempts to monopolize as well as actual monopolization. And Section two of the Capper-Volstead Act contains no provision giving immunity from the Sherman Act in the absence of a proceeding by the Secretary. We think that the procedure under Section two of the Capper-Volstead Act is auxiliary and was intended merely as a qualification of the authorization given to cooperative agricultural producers by Section one, so that if the collective action of such producers, as there permitted, results in the opinion of the Secretary in monopolization or unduly enhanced prices, he may intervene and seek to control the action thus taken under Section one. But as Section one cannot be regarded as authorizing the sort

of conspiracies between producers and others that are charged in this indictment; the qualifying procedure for which Section two provides is not to be deemed to be designed to take the place of, or to postpone or prevent, prosecution under Section one of the Sherman Act for the purpose of punishing such conspiracies.

Fifth. Having dealt with the construction placed by the court below upon the Sherman Act, our jurisdiction on this appeal is exhausted. We are not at liberty to consider other objections to the indictment or questions which may arise upon the trial with respect to the merits of the charge. For it is well settled that where the District Court has based its decision on a particular construction of the underlying statute, the review here under the Criminal Appeals Act is confined to the question of the propriety of that construction. *United States* v. *Keitel, supra; United States* v. *Kissel, supra,* p. 606; *United States* v. *Miller,* 223 U. S. 599, 602; *United States* v. *Carter, supra; United States* v. *Colgate, supra; United States* v. *Schrader's Son, supra; United States* v. *Hastings, supra.* The case of *United States* v. *Curtiss-Wright Corporation,* 299 U. S. 304, is not opposed, as there the decision of the District Court was not based upon a particular construction of the underlying statute, but upon its invalidity, and the jurisdiction of this Court extended to the consideration of the rulings of the District Court which dealt with that question.

The limitation applicable in the instant case to the question of the District Court's construction of the Sherman Act disposes of the contention urged by some of the defendants that counts two and four do not show such a direct restraint upon interstate commerce as to bring the acts charged within the statute. The District Court said in its opinion that, in view of its rulings (above discussed) as to counts one, two and four, it was unnecessary to decide "whether or not the allegations of the indictment show that interstate commerce was or was not restrained". 28 [redacted], p. 187. In its judgment the court formally overruled all objections to these counts so far as the objections rested on the ground that interstate commerce was not involved. If these rulings be treated as dealing merely with the construction of the indictment, they must be accepted here. *United States* v. *Patten, supra; United States* v. *Colgate, supra; United States* v. *Hastings, supra.* But, apart from that, the District Court certainly has not construed the Sherman Act as inapplicable upon the ground that interstate com-

merce is not involved, and the question of the bearing upon that commerce of the acts charged is not before us.

Similarly, the contention of the defendants who are labor officials that the Sherman Act does not apply to labor unions or labor union activities is not open on this appeal. The District Court did not construe the Sherman Act as inapplicable to these defendants and the Government's appeal, under the restriction of the Criminal Appeals Act, does not present that question.

The appeal as to count three is dismissed. The judgment is reversed as to counts one, two and four, and the cause is remanded to the District Court for further proceedings in conformity with this opinion.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.